IN THE

Supreme Court of the United States

RECEIVED
DEC 2 1944
CHARLES ELMORE CROPLEY
CLERK

October Term, 1944
No. 723

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,
Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Writ of Certiorari and Brief in Support Thereof.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles 14,
Attorney for Petitioners and Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari 1

A.

Jurisdiction 2

Jurisdiction is conferred on this court by Title 18, Section 347, United States Codes 2

B.

Short statement of the case 3

C.

A hearing should be granted by this court to decide these new and important questions of criminal law and criminal procedure 16

D.

Grounds of granting petition for certiorari 18

E.

Cases and statutes believed to sustain jurisdiction 19

Brief in Support of Petition for Writ of Certiorari 21

I.

The Ninth Circuit Court of Appeals erred in holding that Local Selective Service Board No. 199 had any jurisdiction of James L. Sartor after he had been inducted into the armed services; without such jurisdiction no offense was committed 21

II.

The Ninth Circuit Court of Appeals erred in taking into consideration on rehearing secret directives of the Selective Service Director entitled "Local Board Memorandum No. 80," issued January 10, 1942, and "Memoranda or Directives to State Directors No. 1-415," dated April 17, 1942, and "No. 1-423," dated May 18, 1942, and "State Director Advice No. 204," dated May 8, 1943 22

PAGE

III.

The Ninth Circuit Court erred in extending the scope of the directives beyond their plain language assuming that it has jurisdiction to do so, in applying such directives to local draft boards, not specified in the directives..... 25

IV.

The Circuit Court of Appeals erred in holding that even if the local board had jurisdiction the government appeal agent had any jurisdiction..... 31

V.

The Circuit Court of Appeals erred in holding that there had been a conspiracy to ask a bribe with intent to influence Cohen's official action, since Sartor had already been granted an additional furlough by the military authorities a day or two before March 6, 1943, which precluded any conspiracy to influence Cohen's official action, as the matter for which the official action was allegedly sought had already been accomplished..... 31

VI.

The Circuit Court erred in upholding the admission into evidence of conversations had with appellant Schnee after Schnee's arrest on March 6, 1943, at the studio of 20th Century-Fox, which conversations were participated in by three government witnesses and appellant Schnee in the absence of appellant Cohen..... 31

PAGE

VII.

The Circuit Court of Appeals erred in holding that there was no error committed in admitting into evidence statements taken from appellant Schnee following his arrest and while he was held in the custody of a Los Angeles police officer, an agent of the F. B. I., and in holding in particular that it was not error to admit before the jury the fact of refusal by Schnee to sign a statement for the F. B. I..... 37

VIII.

The Circuit Court of Appeals erred in permitting the statements at the police station and the proceeding had with Schnee while he was being held in custody of the F. B. I. and before any arraignment, and while he was denied the right to see his counsel, to go before the jury. It was properly no part of the trial..... 38

INDEX TO APPENDICES.

PAGE

Appendix A. Opinion and dissenting opinion, dated May 19, 1944 41

Appendix B. Government appeal agents..... 51

Appendix C. A review of the Selective Service and Training Act of 1940 (Public Act No. 783, 76th Congress, approved September 16, 1940)..... 53

Appendix D. Testimony of H. J. Ross, Albert Charles Schnee, Harry M. Popkin..... 57

Appendix E. Testimony of David A. MacCulloch..... 65

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

Anderson v. United States, 318 U. S. 350 ..... 20, 38
Benson v. United States, 27 Atl. 331 ..... 20, 32
Billings v. Truesdale, 88 L. Ed. 573 ..... 20, 30
Burke v. Tregre, 19 Wall. 519, 22 L. Ed. 158 ..... 19, 24
Commonwealth v. Reese, 29 S. W. 352 32
De Jonge v. Oregon, 299 U. S. 353 81 L. Ed. 278 20
Edwards v. United States, 312 U. S. 473, 85 L. Ed. 957 ..... 19, 23
Gros v. United States, 136 Fed. (2d) 878 38
Gunning v. People, 59 N. E. 494 32
Johnson v. United States, 318 U. S. 189 37
Logan v. Unted States, 144 U. S. 263 ..... 20, 33
McNabb v. United States, 318 U. S. 332 ..... 20, 38
McNulty, Ex parte, 77 Cal. 164 27
Pierce v. United States, 314 U. S. 306, 36 L. Ed. 226 ..... 19, 20, 27, 32
State v. Butler, 77 S. W. 560 32
Stromberg v. California, 283 U. S. 359, 75 L. Ed. 1117 20
Thornhill v. Alabama, 310 U. S. 88, 85 L. Ed. 1093 20
United States v. Boyer, 85 Fed. 425 32
United States v. Falcone, 109 Fed. (2d) 579 32
United States v. Gibson, 47 Fed. 833 32
Vierick v. United States, 318 U. S. 236, 87 L. Ed. 734 ..... 19, 27
Woo Wai v. United States, 223 Fed. 412 20
Yee Gee, In re, 83 Fed. 145 ..... 20, 32

STATUTES.

Criminals Appeals Rules VIII and IX 19
Criminal Code, Sec. 117 20
Regulation 1-415, dated April 17, 1942 25

PAGE

Selective Service Regulations, Sec. 603.71 ..... 19, 31

Selective Service and Training Act of 1940, Public Act 783, 76th Cong., approved Sept. 16, 1940 20

54 Statutes 885, C-720 (50 U. S. C. A., Appx, Sec. 301) 21

The Federal Register Act, Title 44, Secs. 305, 307 ..... 19, 25

United States Codes, Title 5, Sec. 300(a) 38

United States Codes, Title 18, Sec. 18 19

United States Codes, Title 18, Sec. 207 ..... 19, 20, 31

United States Codes, Title 18, Sec. 395 38

United States Codes, Title 28, Sec. 225 22

United States Codes, Title 28, Sec. 347 19

IN THE

Supreme Court of the United States

October Term, 1944

No. .....

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,
Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA.
Appellees.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof:

Your petitioners, Emanuel Max Cohen and Albert Charles Schnee, respectfully petition this Honorable Court for a writ of certiorari directed to the Ninth Circuit Court of Appeals to review the judgment and order of said court, affirming the judgment of conviction (after first reversing the same) of conspiracy to ask a bribe.

This case involves the important question of interpretation of the Selective Service Act and the military status of a person inducted into the armed forces of the United States.

A.

JURISDICTION.

Jurisdiction Is Conferred on This Court by Title 18, Section 347, United States Codes.

The first decision of the Ninth Circuit Court of Appeals which reversed the judgment of the lower court was rendered on May 19, 1944. This decision is attached hereto as an appendix. The Government filed a petition for rehearing on June 17, 1944. On August 26, 1944, the court granted the petition for rehearing and resubmitted the cause for consideration and decision on the record and briefs on file. The Government's petition for rehearing contained directives and other matters heretofore not presented in the courts in any proceeding. No further oral argument or other hearing was ordered by the court [R. 384, 385].

On September 29, 1944, the Ninth Circuit Court rendered a second judgment in the case affirming the lower court's judgment [R. 385, *et seq.*]. On October 23, 1944, and within the time allowed by law the appellants filed a petition for rehearing and for an order of the court vacating its last decision and the judgment, which petition was denied on November 6, 1944 [R. 400]. On application to the court the mandate was stayed to and including December 11, 1944, and until after this court passes upon this petition for certiorari [R. 401].

B.
SHORT STATEMENT OF THE CASE.

Petitioners were convicted of conspiracy (Title 18, Sec. 88) in Count II of the indictment charging them with conspiracy to ask a bribe from one James L. Sartor on March 6, 1943, the proceedings involving the application of said James L. Sartor for a recommendation for an extended furlough. Sartor was then already in the Army. Neither of the petitioners was in the Army; Emanuel Max Cohen was an appeal agent for Local Board 199 of the Selective Service; he is an attorney at law.

James L. Sartor was inducted into the United States Army on October 14, 1942 [R. 68]. At the time of his induction he was the owner of a retail liquor store at 424 North Main Street in Los Angeles, and also owned and operated a bar at that address and a store and apartment building at 3600 West Sixth Street in Los Angeles [Government's Exhibit 3, R. 85].

Sartor had secured various furloughs from the Army through a man named John E. Barr, who described himself as a publicity man, and who was called as a Government witness. Sartor had paid Barr several hundred dollars and Barr had in turn solicited the aid of the late Senator McNary of Oregon, who had communicated with Army officers in behalf of Sartor [R. 134-137].

On February 11, 1943, Sartor applied to the Army for an additional sixty-day furlough [R. 68, 69, testimony of Sartor, Government's Exhibit 1]. On February 17, 1943, Colonel Albert E. Merrill of the U. S. Army at Fort Douglas, Utah, wrote Sartor and informed him that his, Sartor's, request would be granted if his local draft board would so recommend [R. 69-71].

On March 1, 1943, Sartor called upon Emanuel Max Cohen, who was then Government Appeal Agent for Local Draft Board 199, and an attorney at law who had an office at the Hart Distillery where he was employed as one of their attorneys. Sartor exhibited to Cohen the letter from Colonel Merrill, and Cohen suggested that Sartor meet him at the office of Local Draft Board 199 in the evening. Sartor was a customer of the Hart Distilleries where Cohen was employed.

Cohen met Sartor at the office of the draft board later and discussed the matter, and in Sartor's presence dictated a letter to the Army authorities at Fort Douglas, Utah, on March 1, 1943. Sartor called at the draft board and picked up the letter dictated by Cohen and took it to Cohen's office for his signature, and personally deposited it in the mail [R. 71-74].

When this letter was received by the Army Chief of Staff at Fort Douglas the Chief telephoned Colonel Merrill, and instructed him to give Sartor the additional sixty days which Sartor had requested. This Colonel Merrill did on either the 4th or 5th day of March, 1943 [R. 178, testimony of Colonel Merrill]. (Note: This is before the date of any alleged conspiracy, which date is March 6, 1943.)

On the day that Sartor mailed the letter to the Army which Cohen had signed, to-wit, March 2, 1943, he took a copy of Cohen's letter to John E. Barr, who had been engineering Sartor's various previous extensions "for a fee" as Barr expressed it, Barr advised Sartor that Cohen's letter was not adequate for the Army authorities to act upon and that Sartor should see Cohen and get a recommendation [R. 137, testimony of John E. Barr].

On March 3, 1943, Sartor again called on Cohen, stating that the letter was inadequate, and sought a letter of recommendation. Cohen told Sartor that he himself had no authority to make a recommendation to the Army, and according to Cohen's testimony the following took place:

> "He showed me a pass of some sort and he said, 'By the way, the letter you wrote isn't sufficient and Fort Douglas asked for a recommendation.' And I told him that my duties don't permit me to make a recommendation. So he stated, 'However, the letter asked for a recommendation and I think the Board should make a recommendation.' I said, 'That is up to the Board to do.' I said, 'Where is the letter?' And he said, 'I don't know. It may be home.' And I said, 'Well, go home and find the letter.' Then he left and he came back later in the evening and he stated to me that he could not find the letter; he didn't know where it was. At that time I asked him how it happened that he got these other 60 day furloughs. You see, we had never had a situation like that at our Draft Board before. And he stated he got them through Senator McNary. I asked him how he came in contact with Senator McNary and he stated through a friend of his, Mr. Barr. I asked him if Mr. Barr would be familiar with the contents of that letter and he said: 'I don't know. He may.' I asked him how I can get in touch with Mr. Barr and he stated to me that he may be reached at the Council Press Room at the City Hall. I telephoned the Council Press Room and was unable to contact him. I then called Miss Celio, the clerk at the Draft Board, and I explained to her what I thought was the contents of that letter and asked her to communi-

cate with the Coordinator to find out whether the Board had jurisdiction to entertain such a recommendation. And she stated she would. And I told Mr. Sartor — I asked him for his phone number, which he gave me, and I told him that as soon as I found out I would let him know. A while later Miss Celio telephoned me and she told me that the Coordinator had stated that the Board would have jurisdiction to make a recommendation in such a situation. I didn't hear from Mr. Sartor that day any more. He came in the next day in the early afternoon. This was Thursday, the 4th of March, 1943. He came in and asked me what the Board said. I don't recall exactly, but words to that effect. And I told him that the Board had jurisdiction; that I will present it to them at the next—at a meeting on Saturday morning. And he asked me if there was anything I could do and I said, 'I have no right to make any recommendation. There isn't anything I can do except to present it to the Board. I will present all the facts to them.' And that was about the extent of the conversation. I also told him that he had better take care of his business affairs, because he had received so many furloughs that it was questioned in my mind whether he would receive very many more and that it was—that as far as his building was concerned, he could have a bank or a real estate broker manage the building for him while he was away, to collect the rent and pay the taxes and make whatever repairs were necessary, as far as his business was concerned." [R. 208-210.]

Cohen told Sartor that he would try to get him a purchaser for the store [R. 213].

Sartor conveyed these various conversations and transactions to his emissary Barr, who had arranged all of his various extensions with the Army.

On March 4th or 5th Sartor had already received a sixty-day extension from the Army on orders of Colonel Alberto Merrill. On March 6th Sartor was still unaware of the Army order granting him this extension, as were Cohen and the Local Draft Board 199.

On the morning of March 6th, at 10:30 o'clock, petitioner Cohen drove up in front of Sartor's place of business, stopped his automobile, blew his horn, and Sartor came out and talked with Cohen. At that time, Sartor said, Cohen stated to him that he had somebody who was going to help Sartor out and that this fellow's name was Davis; that Davis would call Sartor within the next ten or fifteen minutes; that Davis was going to help Sartor get an extension from the Army. Sartor said that Cohen then drove away [R. 75].

Petitioner Albert Charles Schnee has known petitioner Cohen for twelve years. He had not seen Cohen for some time prior to March 6, 1943 [R. 243]. Schnee was formerly connected with the Internal Revenue Department, and was at the time of this occurrence employed by 20th Century-Fox Film Studio. It had been Mr. Cohen's practice always to submit to Mr. Schnee his income tax returns [R. 218, 219].

On March 5, 1943, petitioner Cohen called Mr. Schnee, made an appointment to see him in his office the next morning, March 6th, at which time Mr. Schnee went over Cohen's income tax return after Cohen had explained to him that he had been recently married and that his wife was operating the business.

Cohen then told Schnee that he was the Government Agent for the Local Draft Board, and that a man named Sartor had made an application for deferment which was pending before his Board; that Sartor was the owner of a retail liquor store with a good location; that he, Cohen, was interested in buying a store, but did not desire to open negotiations in his own name as it might embarrass him as a Government Appeal Agent. Cohen requested Schnee to telephone Sartor to determine what price Sartor placed upon his business and to obtain an inventory from Sartor. Mr. Schnee called Sartor in Cohen's presence and Sartor suggested that Schnee telephone him back at 11:30 (March 6, 1943).

Cohen said that he had stopped by Sartor's place of business to have Sartor point out the packaged store which Sartor had, and Cohen told Sartor to wait before disposing of his store until after he found out what disposition the draft board had made in his case before he made any decision relative to the store [R. 214].

Cohen appeared before Local Draft Board 199 on Saturday, March 6, 1943, after 11 o'clock. He advised the Board that he was submitting the application of Sartor for an extension, without any recommendation. He did not urge the Board to act favorably [R. 185, testimony of Government witness Harry H. Harrison].

Sartor testified that at about 11 o'clock on the morning of March 6, 1943, he received a telephone call from a man named Davis; that Davis asked Sartor if he wanted an additional sixty-day furlough and Sartor said "Yes," and Davis said that it would cost him $2,000; Sartor said, "That is too much." He asked Davis to call

him up again, and said he would let him know later [R. 75-79].

Petitioner Schnee testified that after his first conversation with Sartor at 10 o'clock he did not call Sartor again until noon time, at which time Sartor said he wanted $2,000 for his business, plus inventory; that Schnee asked Sartor if he had an inventory, and Sartor said he did.

Schnee asked Sartor if he had a monthly statement, and Sartor replied in the affirmative. Upon Sartor's reply that he did have an inventory, there was some discussion as to how the delivery to Schnee of the inventory could be effected [R. 247, 248, testimony of James L. Sartor].

Sartor testified that Cohen came back to his store after 12 o'clock noon; that he, Sartor, went out and got into Cohen's automobile and he had a conversation with him. Sartor stated that Cohen had inquired if Davis had called and Sartor related that Davis had asked Sartor for $2,000, and that Sartor declared that it was too much money and Cohen said to Sartor that he, Cohen, did not have anything to do with it; that Sartor was dealing with Davis. Sartor said that Cohen then drove away [R. 80, testimony of Sartor].

Petitioner Cohen testified that after the hearing before the Draft Board on Saturday morning, March 6th, he drove back to Sartor's place of business and had a conversation with Sartor, relating to him that the Board had recommended an extension for him of thirty days, but cautioned him that this recommendation might not be acted upon by the Army authorities. He suggested that Sartor should open an escrow immediately, stating, in his opinion, that if Mr. Davis bought the store no difficulty

would be experienced in transferring the license. Sartor seemed to be very much upset about the matter [R. 216, 217, testimony of Emanuel Max Cohen].

(Note: The establishment of a conspiracy between Cohen and Schnee rests entirely upon evidence of the two conversations Sartor had with Cohen on the morning of March 6, 1943, immediately above referred to. Any inference supporting the Government's theory of conspiracy between Petitioner Schnee and Petitioner Cohen must legally rest upon the evidence of these two conversations. The conversation immediately above related was the last contact Cohen had with Government's witness, Sartor, who is named in the indictment as the person from whom a bribe was to be asked.)

Sartor testified that about 2 o'clock on Saturday afternoon, March 6, 1943, this man Davis called him on the telephone the second time and told him that for $500.00 he could get him a thirty-day furlough. Sartor agreed, and the man who represented himself to be Davis told him to put the money in an envelope and bring it down to the Burbank Theatre on Main Street and deliver it to a Mr. Popkin, who had an office in the theatre, at 2:30 p. m. [R. 83, testimony of Sartor].

Mr. Schnee said he called Sartor up a second time during the afternoon of March 6, 1943, and told him to place his inventory in an envelope and to take it to Mr. Popkin at the Burbank Theatre, he, Schnee, having previously called Mr. Popkin, who was an acquaintance of his, to receive the envelope from Sartor [R. 248, 249].

Immediately following the occurrence of the last telephone conversation between Schnee and Sartor, Sartor

testified he telephoned Government's witness John E. Barr, who had been previously handling the matter of obtaining Army extensions for Sartor, and advised Barr what had occurred [R. 83].

Barr, after Sartor had related these matters to him, went to the Auto Theft Detail where Barr had a friend named Officer Donovan, and Barr requested Police Officer Thomas Donovan to accompany him to Sartor's place of business. There Sartor, Barr and Donovan arranged that Sartor put $176.00 of money in an envelope after the numbers on the money had been recorded, and Officer Donovan and Barr took Sartor down to the Burbank Theatre where he delivered the envelope containing the money to Harry Popkin [R. 128, 129, testimony of John E. Barr].

After Popkin received the envelope Officer Donovan appeared and advised Popkin he was a policeman. Some prolonged argument ensued between Officer Donovan, Popkin and Government's witness Barr, and Popkin turned the envelope over to Officer Donovan [R. 129].

Mr. Popkin then telephoned Mr. Schnee and Officer Donovan listened in to the conversation. Popkin said to Schnee, "What the hell are you getting me into?" and Schnee said, "What do you mean?" Popkin then told Schnee about the enevlope with the money in it. Schnee said, "I know about the envelope, but what's this all about?" [R. 116, 117, testimony of Officer Donovan].

Following this telephone conversation Officer Donovan accompanied by Government's witness Barr went to the Twentieth Century-Fox Film Studio where they located Schnee, and had a conversation with him there. Schnee denied any criminality in connection with the matter,

whereupon Officer Donovan placed Schnee under arrest and subsequently took him to the detective bureau of the Los Angeles Police Department [R. 117, 122, 123, testimony of Officer Donovan].

Petitioner Schnee arrived at the police department at about 5:30 in the afternoon and was detained there until about 10:30 at night. The police department called in members of the Federal Bureau of Investigation. At 10:30 at night they took Mr. Schnee over to the office of the F.B.I. in the Security Building; he called his wife and asked her to have his lawyer, H. J. Ross, contact him at once. Schnee was denied an interview with his lawyer by both the police department and by members of the F.B.I.

Members of the F.B.I. interrogated Petitioner Schnee and attempted to induce him to sign a statement, which he refused to do. This fact was later introduced in evidence over objections. At 3:00 o'clock on Sunday morning, March 7th, after Schnee had consistently refused to admit criminal complicity in the matter, although admissions against his interest had been wrung from him, members of the F.B.I. took him to the county jail and incarcerated him there on the ground that he did not have his draft card in his possession, although he had explained to them that the draft card was home on his dresser [R. 253-258].

Attorney Ross testified that he tried constantly at both the police department and the Federal Bureau of Investigation to contact his client, Albert Charles Schnee, and was advised at both places that the man was not there and that they had never heard of him.

Attorney Ross had obtained Schnee's draft card and had it in his possession at all times while he was attempting to contact Mr. Schnee [R. 271-276, testimony of H. J. Ross].

After the cause was submitted and argued before the Ninth Circuit Court of Appeals, that court in reversing the judgment said:

> "In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not 'an officer of the United States or a person acting for or on behalf of the United States in any official capacity' nor could he in the circumstances 'ask . . . money with intent to have his . . . action on any . . . matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby.'
>
> "Appellant Cohen, then, could not have committed an offense against the United States under §207, Title 18, U.S.C.A., as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United

States v. Furer (D.C. Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (D.C. Mo.), 85 Fed. 425, 436; United States v. Gibson (D.C. Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

"Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act."

The Government, following this decision, filed a petition for rehearing, in which it asked for a rehearing, among other grounds, because of the fact that the court's decision "creates a dangerous precedent" "and vitally affects the present functioning of the selective service system during the present war."

In this petition for rehearing the Government set out for the first time a number of directives in the selective service. None of these directives was introduced in evidence before the trial court or in the trial of the case. They are directives within the bosom of the selective service and the military authorities; they are not a part of the federal register.

One of the directives was dated May 8, 1943, subsequent to the date alleged in the conspiracy.

The Ninth Circuit Court granted the petition for rehearing and thereafter affirmed the judgment it had previously reversed, basing its affirmation on some of the directives introduced in evidence before that court for the first time and without any hearing thereon. Nor was there a date set for oral argument before the Circuit Court of Appeals. Some of these directives found their way into the final opinion of the court [R. 391, 392].

Upon affirmation of the judgment petitioners then petitioned the Circuit Court to rehear the case, not only to hold oral arguments on the matters which had been reconsidered by the court on rehearing and from the Government's brief, and to vacate its judgment, but also to eliminate from its consideration matters which had not been introduced in evidence in the trial of the case but which had been presented to the Circuit Court for the first time on appeal.

The petition to vacate its judgment and grant a rehearing and oral argument and to consider the matters thus raised was denied by the Circuit Court on November 6, 1944.

C.

A HEARING SHOULD BE GRANTED BY THIS COURT TO DECIDE THESE NEW AND IMPORTANT QUESTIONS OF CRIMINAL LAW AND CRIMINAL PROCEDURE.

1. Has a Circuit Court of Appeals the right to take into consideration the secret selective service or military directives without a hearing, without a cross-examination, or without any testimony being presented in the trial court or in the Circuit Court, and base a decision upon such directives and such new data presented to it for the first time?

2. Has a Circuit Court of Appeals the right to take into consideration and take judicial notice of secret directives of the military authorities or selective service? Has any court the right to take judicial notice of secret directives without any witnesses?

3. When a man is inducted into the Army and is under military control, does the Selective Service Board or any attache thereof have any jurisdiction over such inductee?

4. If a military officer having complete control over an inductee asks one not in the military service for a recommendation, does such request change the status of the inductee or of the person who is requested to make the recommendation?

5. Where a directive refers to a "state director of selective service" may this be enlarged by the court to refer to the "local board"?

6. May the duties of a Government Appeal Agent in the selective service be extended beyond the scope of the express authority granted by statute?

7. Where a furlough has already been granted to an inductee by the military authorities who have jurisdiction over him, can one who is not in the military service and who has no control over the inductee be guilty of asking a bribe on the following day after the furlough has already been granted and for which the bribe is allegedly solicited?

8. Was it error for the Government to introduce in evidence the refusal of Petitioner Schnee to sign a statement at the F.B.I. headquarters following his arrest, which refusal was in effect, standing on his constitutional right?

9. Was it error for the court to permit in evidence statements taken by the F.B.I. subsequent to the arrest of Schnee and after the termination of the alleged conspiracy?

10. Was it error for the trial court to permit to go before the jury the purported statement of Schnee taken at the offices of the F.B.I. and before he was arraigned before any magistrate, and when he was not permitted to have counsel or to be advised of his legal rights?

11. Where a petition for rehearing by the Government is granted by the Circuit Court of Appeals, and that petition contains new matters not theretofore presented or argued, should the Circuit Court of Appeals, after granting a rehearing, give the appellants an opportunity for oral argument before deciding the case adversely to such appellants, on the basis of new matters thus presented on the petition for rehearing?

D.
GROUNDS OF GRANTING PETITION FOR CERTIORARI.

The questions raised by this petition are new and of great importance in the aspects of supervisory criminal procedure, as well as from the standpoint of the correct interpretation of military and civil law today.

The case involves:

1. The status of an inductee after induction into the service and his relationship with the appeal agent of his former selective service board.

2. The jurisdiction of the Circuit Court of Appeals in taking into consideration new matters upon appeal, not presented by any witness.

3. Whether a court may take judicial notice of secret military or selective service directives.

4. Whether one may be convicted of asking a bribe to influence him when (a) the thing that he asks a bribe for has already been done; (b) the thing requested is not one that involves any statutory duty on his part.

5. Whether a refusal to sign a statement at the F.B.I. headquarters may be used against one in the trial of his case.

6. Whether the statements taken after an alleged conspiracy, and while one is in custody at the F.B.I., but has never been arraigned and never been permitted to have counsel (and counsel has actually been refused permission to see him)may be used in evidence against the accused.

It is respectfully submitted that these questions are of great importance in the present military and civil handling of inductees and in the supervisory control of this court over criminal procedure, and that this court should there-

fore grant a hearing because of the great importance of the issues involved and for guidance to courts and boards throughout the country.

It is also urged that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this court, and further, that it extends the statutory rights and duties of state directives, local boards and Government appeal agents, and also the application of a statute beyond the fair scope of its intendment.

E.

CASES AND STATUTES BELIEVED TO SUSTAIN JURISDICTION.

U. S. Codes, Title 28, Sec. 347;

U. S. Codes, Title 18, Secs. 18 and 207;

Selective Service Regulations, Sec. 603.71.

The Circuit Court of Appeals may not take into consideration matters not a part of the record certified to the Circuit Court of Appeals by the District Court.

Criminal Appeals Rules VIII and IX;

Edwards v. United States, 312 U. S. 473, 480, 85 L. Ed. 957, 963;

The Federal Register Act, Title 44, Secs. 305, 307.

Selective service directives are not published in the federal register.

Directives are not judicially noticed.

Burke v. Tregre, 19 Wall. 519, 526, 22 L. Ed. 158.

A statute may not be extended beyond its language.

Vierick v. United States, 318 U. S. 236, 253, 87 L. Ed. 734;

Pierce v. United States, 314 U. S. 306, 36 L. Ed. 226.

It is impossible for an official to violate Section 207 of Title 18, U. S. Codes (Section 117 of the Criminal Code) by asking for money with intent that it influence him on a matter before him if that matter has already been accomplished or is not before him officially, or in his official capacity.

Pierce v. United States, 314 U. S. 306, 36 L. Ed. 226;

Thornhill v. Alabama, 310 U. S. 88, 96, 85 L. Ed. 1093, 1099;

De Jonge v. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278;

Stromberg v. California, 283 U. S. 359, 367, 368, 75 L. Ed. 1117-1123;

Woo Wai v. U. S., 223 Fed. 412.

It was error for the court to admit the evidence of proceedings at the F.B.I.

Benson v. United States, 27 Atl. (D. C.) 331;
In re Yee Gee, 83 Fed. 145;
Logan v. United States, 144 U. S. 263, 309;
McNabb v. United States, 318 U. S. 332;
Anderson v. United States, 318 U. S. 350.

The defendants had no official authority or capacity as Sarbor was inducted.

The Selective Service and Training Act of 1940, Public Act 783, 76th Cong., approved September 16, 1940;

Billings v. Truesdale, decided by this court March 27, 1944, 88 L. Ed. 573.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners and Appellants.

IN THE

Supreme Court of the United States

October Term, 1944

No. .....

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices Thereof:

I.

The Ninth Circuit Court of Appeals Erred in Holding That Local Selective Service Board No. 199 Had Any Jurisdiction of James L. Sartor After He Had Been Inducted Into the Armed Services; Without Such Jurisdiction No Offense Was Committed.

Selective Training Civil Service Act of September 16, 1944, as amended;

54 Stat. 885 C-720, 50 U. S. C. A. Appx. section 301 *et seq.*

II.

The Ninth Circuit Court of Appeals Erred in Taking Into Consideration on Rehearing Secret Directives of the Selective Service Director Entitled "Local Board Memorandum No. 80" Issued January 10, 1942, and "Memoranda or Directives to State Directors No. I-415" Dated April 17, 1942, and "No. I-423" Dated May 18, 1942, and "State Director Advice No. 204" Dated May 8, 1943.

None of these directives was introduced in evidence in the trial of the case. No witnesses testified to them and no witnesses were made available to the defendants who could testify that there were other directives that might have changed, altered or supplmented these directives or whether any of them ever reached Local Board 199, or that it ever had cognizance of them or were acting under any so-called directives. None of these directives appear in the Federal Register. It was therefore error for the Circuit Court to consider them on the appeal of the case.

In its petition for rehearing the Government cited for the first time various directives which it is claimed were issued by Selective Service. (Appellee's Petition pp. 10-13.)

The jurisdiction of the Circuit Court of Appeals is strictly appellate. (Title 28, Sec. 225, U. S. C.) In the absence of consent or stipulation of the defendants that court was without power or authority to consider these directives in reaching its decision.

It is respectfully submitted, therefore, that the Circuit Court erred in taking cognizance of these so-called directives.

In *Edwards v. U. S.*, 312 U. S. 473, 480; 85 L. Ed. 957, 963, the court said:

> "The government introduced in the Court of Appeals a purported transcript. . . .
>
> "Finally, the government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and that actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX."

The directives first produced by appellee on its petition for rehearing were no part of the record below. No witness testified to them. Their existence rests in the secret files of the military organization. There may be many others that may change or alter their tenor. Appellants had no opportunity to examine or cross-examine the witness who produced them; neither the court nor jury below, nor the Circuit Court, had the benefit of such examination and cross-examination.

As said in the *Edwards* case, 312 U. S. at 482:

> "The parties must be given an opportunity to plead and prove their contentions or else the impressions of the judge arising from sources outside the record

> dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

That the Government thought its own case was inadequate in the trial court is shown by the fact that it chose to produce new evidence in the form of these directives in the Circuit Court of Appeals. That the Circuit Court thought the case below was inadequate is shown by the fact that in that court the judgment was reversed until this new evidence in the form of directives was presented there.

The case should therefore be reversed, so that upon a new trial both sides may elicit all the directives and proceedings by adequate testimony "tested by cross-examination" of witnesses, and so that the case may not be decided "from sources outside the record."

See also *Burke v. Tregre*, 22 L. Ed. 158, 159, 19 Wall. 519, 526, wherein it was said by this court:

> "It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him."

The Federal Register Act, Title 44, sections 305, 307, provides that judicial notice may be taken of rules and regulations published in the federal register. These directives are not among the rules and regulations published in the federal register. Under the rule of *inclusio unis exclusio alterius* the directives not published are not to be given judicial notice.

III.

The Ninth Circuit Court Erred in Extending the Scope of the Directives Beyond Their Plain Language Assuming That It Has Jurisdiction to Do so, in Applying Such Directives to Local Draft Boards, Not Specified in the Directives.

Regulation I-415, dated April 17, 1942, is directed to all *state directors*. Nothing is said in the regulation regarding *local boards*, and nothing is said therein regarding appeal agents. The conclusion of the Circuit Court rests on sheer conjecture, and extends the words "state directors" to include "local draft boards."

The situation is comparable to that of employers of persons inducted into the service who are asked for recommendations, or where the Red Cross or social service organizations are asked for them. But these recommendations do not make the persons who are asked for them liable as acting as officers of the United States.

The regulation dated May 8, 1943, which the Government offered on rehearing, was a month and two days after the date of the alleged conspiracy, which was March 6, 1943. But even in that regulation the responsibility is placed upon the state director, not upon any local boards.

The Circuit Court of Appeals substituted the words "local board" and "appeal agent" for the words "state director," even in the directive. Thus it is respectfully submitted that the Circuit Court superimposed and added words in the directive for the purpose of establishing a crime, and that the construction thus given the statute and memoranda is a strained construction.

Since Sartor became a soldier, subject to the exclusive jurisdiction of the Army, the power of the selective service board had ended. This is shown by the action of the Army in granting furloughs.

Another fact that we think the Circuit Court overlooked in its affirmation of the judgment is that Cohen at no time made a recommendation to the board. All of his acts in behalf of Sartor were *prior* to March 6, 1943, the date of the commencing of the alleged conspiracy. He had written and sent a letter, it is true, but prior to that date. He had done all that he thought was within his power to aid Sartor prior to that date.

Harry H. Harrison, a member of Local Draft Board 199, said that on March 6, 1943, when the board had a meeting, the matter of Sartor was presented to the board and Cohen said to the board members that he "was going to submit the case to us without recommendation as to Private Sartor" [R. 182]. "Cohen said, 'It's up to you gentlemen, but it's much better if a man goes into the service not feeling resentful about anything.' That is all he said about the mental attitude of Mr. Sartor. He submitted it to us for recommendation. He didn't urge us to grant it or not grant it." [R. 185.]

This testimony negatives any evidence of acting for money to influence his official action, or his acting at all.

This court has held that a crime cannot be built up by strained construction and inferences beyond the scope of the statute. (*Pierce v. U. S.*, 314 U. S. 306, 86 L. Ed. 226; *Viereck v. U. S.*, 318 U. S. 253, 87 L. Ed. 734; *Ex parte McNulty*, 77 Cal. 164.)

In *Viereck v. United States* the Supreme Court of the United States had before it, in war time, the prosecution of a German propagandist actively engaged by an alien enemy. The court held that one may be subjected to punishment for crime in federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then, only if punishment is authorized by Congress. The court refused to read language into the act which the Government urged it to do.

In its first decision the Circuit Court of Appeals said:

> "We express no opinion as to the official status of the local draft board's action in the instant situation. However, even assuming the draft board had jurisdiction, we believe that Cohen had none. The Selective Service Regulations in effect during the period herein involved provide for the appointment of a government appeal agent and outline his duties. They show that his sole function is to aid registrants under the Selective Service Act through the medium of appeals with respect to their classification by the local board . He is in the nature of an attorney whose services are rendered without charge to registrants in appealing their classifications. He has no function outside the field of draft classification and within that field his duties are limited to those of counsel on appeal.

"In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not 'an officer of the United States or a person acting for or on behalf of the United States in any official capacity' nor could he in the circumstances 'ask * * * money * * * with intent to have his * * * action on any * * * matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby.'

"Appellant Cohen, then, could not have committed an offense against the United States under sec. 207, Title 18 USCA, as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United States v. Furer (DC Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (DC Mo.), 85 Fed. 425, 426; United States v. Gibson (DC Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

"Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act.

"Since the case must be reversed upon the points hereinabove treated, we do not treat of other points urged by the defendant as cause for reversal."

In its second decision the Circuit Court said, using somewhat the same language, but adding the directives:

"We have not been able to find in the Selective Service Act or in the regulations promulgated thereunder any provision specifically authorizing the local draft board or its appeal agent to recommend furlough extensions for one already inducted into the army; we have found nothing vesting in the board or its appeal agent any jurisdiction at all over an inductee. Unquestionably, one actually inducted is subject to military jurisdiction. Billings v. Truesdell, 321 U. S. 542. However, with respect to a furlough extension such as that requested by Sartor it is the policy and practice of the military authorities to require a recommendation of the extension by the local draft board of the applicant. According to the testimony of an army liaison officer, to follow any other procedure would in effect 'nullify the procedure of the Selective Service System in ordering a man in, so we make it a rule.'

"That local boards habitually have performed duties in connection with inductees is evident from various memoranda issued by the National Headquarters of the Selective Service System. Local Board Memorandum No. 80, issued January 10, 1942, discusses separation of inducted men from active military service and their transfer to the Enlisted Reserve. It reveals a duty of cooperation between civil and military authorities: 'After a man has been inducted into military service he passes into military control and questions concerning his retention in or separation from active service are responsibilities of the War Department. All final determinations must be made by the military authorities and it is the expressed intention and desire of the War Department that such determinations be made in accordance with the facts presented and in the best interests of all concerned. *It is the function of all elements of Selective Service, when called upon through proper channels, to assist the War Department with information and recommendation consistent with the facts.*'" (Emphasis added.)

But there is nothing in the Selective Service Act that gives the local board any such jurisdiction as the Circuit Court finally interprets.

This court has held that the jurisdiction of local boards ends when the inductee is inducted into the service. (*Billings v. Truesdell*, 321 U. S. 542.) The decision of the Circuit Court is in conflict with this decision.

IV.

The Circuit Court of Appeals Erred in Holding That Even if the Local Board Had Jurisdiction the Government Appeal Agent Had Any Jurisdiction.

The appeal agent's duties are expressly set forth in the regulations (section 603.71) which says, "For each local board a government appeal agent shall be appointed. The duties of the person so designated are . . . after classification to investigate and report upon matters which are submitted for his investigation by the local board."

The work of the appeal agent, of course, is to handle appeals from local classifications. His work obviously ceases in his official capacity when the inductee, following all appeals, has finally been inducted into the service. It would be a very strained construction to give the local appeal agent any other power or authority. The statute and regulations give him none. It is only by stretching the act beyond its plain language that the court has been able to confirm the conviction in this case.

V.

The Circuit Court of Appeals Erred in Holding That There Had Been a Conspiracy to Ask a Bribe With Intent to Influence Cohen's Official Action, Since Sartor Had Already Been Granted an Additional Furlough by the Military Authorities a Day or Two Before March 6, 1943, Which Precluded Any Conspiracy to Influence Cohen's Official Action, as the Matter for Which the Official Action Was Allegedly Sought Had Already Been Accomplished.

It is impossible for an officer to violate section 207, Title 18 U. S. C. A., by asking for money with intent that

it influence him in a matter which is not before him officially.

Gunning v. People, 59 N. E. 494 (Ill.);

Commonwealth v. Reese, 29 S. W. 352;

State v. Butler, 77 S. W. 560;

In re Yee Gee, 83 Fed. 145;

Benson v. United States, 27 App. (D. C.) 331.

It is elementary that if the acts sought to be induced by bribery are foreign to the duties of the officer involved the officer has not the capacity to commit the offense of seeking a bribe in relation to such acts.

Pierce v. United States, 314 U. S. 306, 86 L. Ed. 226;

United States v. Gibson, 47 Fed. 833;

United States v. Boyer, 85 Fed. 425;

Gunning v. People, 59 N. E. 494 (Ill.);

State v. Butler, 77 S. W. 560.

Appellant Schnee had no official capacity whatsoever, and it is not asserted that he was in any manner acting under or by virtue of any authority delegated to him by the Government.

If Schnee could not be a principal Cohen could not be an aider or abettor or a conspirator with one who could not be a principal. (*United States v. Falcone*, 109 Fed. (2d) 579.)

VI.

The Circuit Court Erred in Upholding the Admission Into Evidence of Conversations Had With Appellant Schnee After Schnee's Arrest on March 6, 1943, at the Studio of 20th Century-Fox, Which Conversations Were Participated in by Three Government Witnesses and Appellant Schnee in the Absence of Appellant Cohen. [R. 130-133, testimony of John E. Barr; R. 117-123, testimony of Thomas W. Donovan; R. 149-151, testimony of Harry Marvin Popkin.]

> "If the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts are not admissible against the others." (*Logan v. United States*, 144 U. S. 263, 309.)

During the trial the Government produced in its case in chief, three witnesses, who were present at a conversation on the afternoon of March 6, 1943, at the studio of 20th Century-Fox Film Studio, which conversation was held and participated in as between the three Government witnesses and Schnee, as set forth in the above paragraph. Appellant Cohen was not present on this occasion.

Government's witness Donovan was a police officer [R. 112, testimony of Donovan].

Upon the arrival of the three Government witnesses, Barr, Donovan and Popkin at the studio, they confronted appellant Schnee, who was an employee there, and Donovan informed Schnee that he, Schnee, was under arrest on an extortion charge [R. 132, testimony of Government's witness John E. Barr].

The three Government's witnesses then engaged Schnee in conversation and jointly interrogated him concerning his prior actions and declarations relating to his transaction involving the arrangement for Sartor (the person from whom the appellants were charged with soliciting a bribe) to deliver bribe money to appellant Schnee through the medium of Government's witness Harry Marvin Popkin, and they also questioned Schnee as to his prior actions in relation to appellant Cohen.

As the record discloses in the case of each witness, appellant Cohen specifically objected to the introduction of this evidence on the first ground that the same called for hearsay testimony as against appellant Cohen, and was incompetent, and on the second ground that it called for the declaration of his co-conspirator Schnee, made after the object of the conspiracy had terminated.

The trial judge in the instance of each witness overruled the objection and allowed evidence of the conversation and Schnee's replies to the interrogations to be received. The appellant's duly excepted to the court's ruling. At the conclusion of the Government's case appellant Cohen moved to strike this testimony from the evidence, which motions were denied and duly excepted to. [For motion to strike this testimony of Government's witness Barr see R. pp. 200, 201; for that of Government's witness Donovan see R. pp. 198 and 199; and for that of Government's witness Popkin see R. p. 200.]

A summary of the testimony of the three witnesses allowed into evidence is here set forth:

Donovan said Schnee admitted he talked with Popkin shortly before Donovan arrived at the studio. Appellant Schnee denied he had talked to Popkin at an earlier hour that day. Donovan stated Barr asked Schnee when he had last seen appellant Cohen, and Schnee said he had either seen Mr. Cohen or talked with him on the telephone that morning (March 6, 1943) [R. 122-123, testimony of Donovan].

Barr stated that Popkin asked appellant Schnee if he remembered calling him earlier in the day about an envelope a man named Sartor was to deliver to Popkin at 2:15 p. m. and Schnee replied he did not know what Popkin was talking about. Barr stated that Schnee told him he had seen Cohen in the morning (March 6, 1943) about an income tax matter [R. 132, testimony of Government's witness Barr].

Popkin testified that appellant Schnee declared to Officer Donovan that he had not talked with Popkin on the telephone at all on the day in question (March 6, 1943), and that Schnee denied he had requested Popkin to receive an envelope for him. Popkin further recited that appellant Schnee declared he knew appellant Cohen but he had not seen Cohen that day (March 6, 1943) [R. 150-151, testimony of Popkin].

The prejudice of allowing appellant Schnee's asserted statements, made at a time when he was under arrest, to

be admitted into evidence against appellant Cohen rests upon the proposition that the statements of Schnee were all conradicted by a preponderance of testimony furnished by Government's witness [R. 174, testimony of Alice Pettus; R. 173, testimony of John Okey; R. 167, testimony of Ruth Brown; R. 142-147, testimony of Harry Popkin].

These extra-judicial statements supported an inference of a consciousness of guilt on the part of a person alleged and contended to be appellant Cohen's co-conspirator. In other words, the false statements and declarations of appellant Schnee were matters that were allowed to militate against appellant Cohen.

The competent evidence, as is pointed out in summary of the evidence, which tends to establish the existence of a conspiracy between appellants, is meager and the error is therefore aggravated by this circumstance. The authorities are unanimous that the extra-judicial statements of a co-conspirator made after the termination of the conspiracy, are not admissible against a defendant such as Cohen, not present at the time the same were uttered.

It is self-evident that the asserted declarations of appellant Schnee made after he had been placed under arrest by Officer Donovan, were not made in furtherance of the objects of the conspiracy. The conspiracy had terminated in frustration when the bribe money was taken from the intermediary (Popkin) and the co-conspirator Schnee was placed under arrest.

VII.

The Circuit Court of Appeals Erred in Holding That There Was No Error Committed in Admitting Into Evidence Statements Taken From Appellant Schnee Following His Arrest and While He Was Held in the Custody of a Los Angeles Police Officer, an Agent of the F. B. I., and in Holding in Particular That It Was Not Error to Admit Before the Jury the Fact of Refusal by Schnee to Sign a Statement for the F. B. I.

Such refusal on the part of Schnee was merely a statement that he was standing on his constitutional rights.

In *Johnson v. United States,* 318 U. S. 189, this court said:

> "But where the claim of privilege is asserted and unqualifiedly granted the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson v. United States, 149 U. S. 60, 37 L. Ed. 650) is then applicable. As said by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness is allowed the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice if either party is to be affected injuriously by it.' "

The evidence which the Government offered as against Schnee regarding his refusal to sign a statement at the F. B. I. was placed before the jury for the purpose of in-

juring him and must be presumed to have accomplished that purpose. If a defendant in custody cannot decline to sign a statement for the F. B. I. without that fact being used against him in a criminal trial, then his constitutional privileges guaranteed by the Fifth Amendment to the Constitution of the United States become valueless.

VIII.

The Circuit Court of Appeals Erred in Permitting the Statements at the Police Station and the Proceeding Had With Schnee While He Was Being Held in Custody of the F. B. I. and Before Any Arraignment, and While He Was Denied the Right to See His Counsel, to Go Before the Jury. It Was Properly No Part of the Trial.

It is submitted that these proceedings prohibited the use of any statements made by Schnee while thus held in custody, and which were presented to the jury for the purpose of affecting the appellants adversely. (Sec. 300(a), Title 5 and Sec. 395, Title 18, U. S. C. A.; *McNabb v. United States,* 318 U. S. 332; *Anderson v. United States,* 318 U. S. 350; *Gros v. United States,* 136 Fed. (2d) 878.)

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners and Appellants.

State of California, County of Los Angeles—ss.

Morris Lavine, being first duly sworn, upon his oath deposes and says: that he is the attorney for petitioners herein, Emanuel Max Cohen and Albert Charles Schnee; that he has read the foregoing Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals of the United States and Brief in Support Thereof, and knows well the contents; that he has carefully read and studied the transcript of record and proceedings in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record and proceedings, and that he verily believes the facts stated in said petition are true.

MORRIS LAVINE.

Subscribed and sworn to before me this 28th day of November, 1944.

CHAS. B. HAZLEHURST,
Notary Public in and for said County and State.



APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

[No. 10,508. May 19, 1944.]

Emanuel Max Cohen and Albert Charles Schnee, appellants, vs. United States of America, appellee.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: MATHEWS, STEPHENS and HEALY, Circuit Judges. STEPHENS, Circuit Judge.

Appellants Cohen and Schnee were indicted upon two counts, to-wit, conspiring to defraud the United States and conspiring to ask a bribe. The jury found them guilty on both counts, but the court, on the ground that both counts referred to one conspiracy, sentenced each under the second count only.

Count two of the indictment charges that on or about March 6, 1943, while Cohen was the government appeal agent of the local draft board having jurisdiction under the Selective Service Act of one James L. Sartor, Cohen and Schnee conspired to ask Sartor for money with the intent to influence Cohen's official action in a matter pending before Sartor's draft board, that is, the application of Sartor for a recommendation directed to the United States Army for an extension of his then existing furlough.

Sartor, while a registrant of Local Draft Board No. 199, Los Angeles, California, was duly selected for military service and, on October 14, 1942, was formally and

actually inducted into the United States Army. At the time of his induction he was given a short furlough and thereafter was granted various extensions until March 8, 1943, when he was to report for active duty. The purpose of the furloughs was to enable Sartor to make some disposition of his holdings including a retail liquor store, a bar, and an equity in an apartment house. On February 11, 1943, Sartor requested an additional sixty days' deferment from active duty on the ground that he had not yet been able to settle his financial affairs. He was notified in return that a recommendation of his local selective service board would be necessary to his securing a further extension.

Sartor consulted Cohen, who was the government appeal agent for his draft board. (See note 1 for duties of the appeal agent.) Cohen wrote a letter to the army officials briefly describing Sartor's property holdings and financial position and stating that Sartor requested a deferment on the basis of those facts. A friend advised Sartor that Cohen's letter did not comply with the condition set by the army and that he should speak to Cohen about obtaining a letter of recommendation from the draft board itself. Sartor asked Cohen for such a letter and was told that Cohen, himself, had no authority to make such a recommendation to the army. The evidence is conflicting as to subsequent events.

According to Cohen and Schnee, the secretary of Draft Board No. 199 inquired of the Coordinator of Selective Service whether the draft board had jurisdiction to make a recommendation with respect to Sartor and was answered in the affirmative. (The Selective Service Act and regulations do not support the conclusion reached.) Cohen

told Sartor that the board was to meet on Saturday, March 6, 1943. On Saturday morning Cohen consulted Schnee about an income tax problem entirely foreign to any phase of this case. During the course of the discussion Cohen, in his personal interest, asked Schnee to ascertain the condition of Sartor's liquor store and the price being asked for it. Cohen desired to purchase the business but for various reasons did not wish to publicize the fact. Schnee, using the name of Davis, had several telephone conversations with Sartor concerning the liquor store. Later Saturday morning Cohen saw Sartor, looked over the liquor store, and remarked that he was on his way to the draft board. At its meeting the draft board decided to recommend a thirty-day extension of Sartor's furlough. Immediately thereafter, Cohen again saw Sartor and informed him of the board's recommendation.

According to Sartor, Cohen, who it must be recalled had formerly admitted his own lack of authority to make a recommendation to the army, told Sartor on Saturday morning, March 6, that one Davis would help him secure the desired extension. Davis spoke to him over the telephone and stated that a sixty-day extension would cost $2000.00. Later he saw Cohen again and commented upon Davis' proposition. Cohen dismissed the matter saying it was between Sartor and Davis; Cohen did not mention the action taken by the draft board. Davis telephoned again and when Sartor suggested a price of $500.00, promised to see what he could do. Later in the day Davis informed Sartor by telephone that for $500.00 he could get only a thirty-day extension; Davis instructed him to put the money in an envelope and deliver it to one Popkin at a nearby theatre. Without any question what-

ever Popkin was a disinterested and innocent participant in the affair.

Sartor, accompanied by several others including one Donovan from the police department, handed an envelope containing some money to Popkin. (Schnee insisted that he had asked Sartor to deliver an inventory of his business to Popkin.) After a lengthy discussion Popkin relinquished the Sartor envelope to police officer Donovan. With Donovan listening in, Popkin telephoned Schnee, whose remarks indicated that Davis was in fact Schnee. Agents of the Federal Bureau of Investigation took charge of the matter. Finally, the conspiracy charge herein was filed against Schnee and Cohen.

In the meantime, mistakenly believing Cohen's letter was the draft board recommendation requested, army officials had granted Sartor an additional sixty-day furlough, which was subsequently cancelled before its expiration.

The indictment herein attempts to charge the crime of conspiracy (18 USCA §88) to commit bribery as defined by 18 USCA §207. The latter section decrees that: "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined * * * and imprisoned * * *." The bribery denounced by the section is limited in scope

to the influencing of a person's action on a matter before him in his official capacity. Appellants contend that count two of the indictment fails to state an offense against the United States because Sartor's draft board had no jurisdiction to recommend an extension of furlough for one already inducted in the army, and because such a recommendation was in no way related to Cohen's duties as a government appeal agent. Schnee acted in no official capacity for the United States, and it is only because of Cohen's position that a conspiracy to commit an offense under §207 would be possible.

We express no opinion as to the official status of the local draft board's action in the instant situation. However, even assuming the draft board had jurisdiction, we believe that Cohen had none. The Selective Service Regulations in effect during the period herein involved provide for the appointment of a government appeal agent and outline his duties. They show that his sole function is to aid registrants under the Selective Service Act through the medium of appeals with respect to their classification by the local board.[1] He is in the nature of an attorney

---

[1]Second Edition of the Selective Service Regulations:

"603.71. Appointment and duties. (a) For each local board, a government appeal agent shall be appointed by the President, upon recommendation of the Governor. The duties of the person so designated are: To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulation."

whose services are rendered without charge to registrants in appealing their classifications. He has no function outside the field of draft classification, and within that field his duties are limited to those of counsel on appeal.

In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not "an officer of the United States or a person acting for or on behalf of the United States in any official capacity" nor could he in the circumstances "ask * * * money * * * with intent to have his * * * action on any * * * matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby."

Appellant Cohen, then, could not have committed an offense against the United States under §207, Title 18 USCA, as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United States v. Furer (DC Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (DC Mo.), 85 Fed. 425, 436; United States v. Gibson (DC Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act.

Since the case must be reversed upon the points hereinabove treated, we do not treat of other points urged by the defendant as cause for reversal.

Reversed.

HEALY, C. J., Dissenting

I think the judgment should be affirmed.

There was abundant evidence that appellants Cohen and Schnee conspired to extract from Sartor a sum of money in return for the use of Cohen's influence in the procurement of an extension of Sartor's existing furlough. The record shows that the army would not grant an extension of the furlough except upon recommendation of Sartor's draft board, and that the board, in turn, would not have made a favorable recommendation in the matter had not Cohen officially advised it. The testimony is that during the progress of the conspiracy Cohen appeared at a board meeting and reported favorably on the extension Sartor was seeking. It is clear that the board relied upon Cohen's advice and followed it—not as the suggestion of an outsider but as the recommendation of an official who had a duty to perform.

It is the function of selective service boards to register and classify eligible men and to order them to report for induction into the army when needed, unless reason for

deferment exists. As stated by a witness, Colonel Merrill, "it is not consistent that the war department should nullify the action of the selective service system by unduly extending the deferment status of individuals selected for service." Hence, he said, it is the custom and practice of the army to call upon the draft boards to make investigations and recommendations in situations of the kind existing in this case. Colonel Merrill, whose current position was that of a liaison officer between the army and the selective service boards, testified not only to the practice, but said that if it were not followed "the effect would be to nullify the procedure of the selective service system in ordering a man in; so we make it a rule." I think the army was not without power to make the rule, nor the system without authority to respond to it.

The situation of the board and of the appeal agent in this instance is analogous to that of the special officers of the Indian service involved in United States v. Birdsall, 233 U. S. 223. These subordinate officers were accused of accepting bribes in return for recommendations of leniency in the cases of certain persons who had been convicted of the crime of selling liquor to Indians. The district court had held that the acts charged did not fall within the condemnation of §117 of the Criminal Code, giving the same reason as that assigned by the majority here, namely, that the officials had no duty to perform in the premises. In reversing the holding the Supreme Court observed that every action within the range of official duty comes within the purview of this statute. In order that the action of the accused person be official, said the court, "it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a

lawful requirement of the department under whose authority the officer was acting. [citing cases] Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities." The court said that if a judge desired recommendations of the Commissioner of Indian Affairs on the subject of leniency, the Commissioner was not lacking in authority to comply with the request. Said the court: "It is not enough to say that there is no mandatory requirement imposing the obligation to give the recommendation. In executing the powers of the Indian Office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law."[1]

The observations are pertinent here. There can be no doubt that Cohen undertook to act and speak in his official capacity in his conference with the draft board on Sartor's case. The board, it was shown, usually relied upon the advice of its appeal agent on any matters out of the ordinary. To me it seems clear that the board itself was acting officially in the premises in line with the settled practice and custom obtaining in cases of this character. The status of the appeal agent was of a piece with that of the board. There is scant justi-

---

[1]For other authorities indicating an equally broad view of the range of official action under the statute consult Whitney v. United States, 99 F. 2d 327; Rembrandt v. United States, 281 Fed. 122; and Fall v. United States, 49 F. 2d 506.

fication for assuming the official status of the latter while rejecting that of the appeal agent. I take it that in any matter upon which the board itself may appropriately be asked to make a recommendation it is entitled to enlist the aid of the appeal agent, for under the regulation the latter is required "to investigate and report upon matters which are submitted for his investigation by the local board."

I think the majority holding exhibits too narrow and restricted a view of the obligation resting upon those entrusted with the administration of the selective service system. To Cohen was given the high assignment of safeguarding the interests of his youthful neighbors subjected to the call of their country in a time of war. His obligation faithfully to live up to his trust was as broad as the exigencies from time to time confronting the system of which he was a part.

(Endorsed:) Opinion and Dissenting Opinion. Filed May 19, 1944. Paul P. O'Brien, Clerk.

APPENDIX B.

Government Appeal Agents.

603.71 Appointment and duties. (a) For each local board, a government appeal agent shall be appointed by the President, upon recommendation of the Governor. The duties of the person so designated are: To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening of any case and to impart to the local board any information which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulations.

(b) An associate government appeal agent may be appointed for a local board by the President when the gov-

ernment appeal agent requests such assistance and, in the opinion of the Governor, the circumstances require it, and the Governor recommends the appointment. He shall perform such duties and shall have such powers and rights as are delegated to him by the government appeal agent. In the absence or inability of the government appeal agent to act, he shall perform the duties and shall have the powers and rights of the government appeal agent.

APPENDIX C.

A review of the Selective Service and Training Act of 1940 (Public Act No. 783, 76th Congress, approved September 16, 1940), discloses the following authority in the local draft board 199, mentioned in the indictment:

"Such local draft boards, under the rules and regulations prescribed by the President, shall have power within their respective jurisdiction to hear and determine, subject to the right of appeal to the appeal board herein authorized, all question or claims with respect to *inclusion for*, or *exemption or deferment from*, training and service under this Act, or all individuals within the jurisdiction of such local boards."

Administration System, Sec. 10, Para. 63,036.

Under Paragraph 63,515.12, Selective Service Regulations (Executive Order No. 8545, promulgated by the President, October 15, 1940), we find the following power expressly invested in the local draft boards.

"The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it is appointed, and to all persons whose registration cards are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law. * * *."

Nowhere in the Selective Service and Training Act, or under the Selective Service Regulations is a local draft board invested with the official right, power or authority to so much as recommend to Army officials the period length of any furlough to be granted to a person already inducted into the armed forces of the government.

The indictment charges that one, Sartor, had already been inducted into the armed forces. It is apparent from a reading of the Act and regulations involved that the authority of the draft board relative to exemptions and/or deferments had expended itself and was inoperative.

"Induction is the process by which men selected for military service pass from the status of civilians to the status of members of the land and naval forces of the United States."

Selective Service Regulations, Para. 63,511.10.

It is certainly reasonable and logical to conclude that after a man has been inducted into the armed forces, his local civilian draft board, as to him, has no further official authority or power so long as the person inducted remains in the status of a member of the armed forces of this government.

"Selective service involves these processes: Registration, classification and selection, and delivery for induction. Registration is the process by which all males subject to registration under the selective service law are listed by name, and constitutes an inventory of man power for military purposes. Classification and selection is the process by which the relative availability of individual men for military service is determined, and those who are most available are selected. * * *."

Selective Service Regulations, Para. 63,511.10.

"An inducted man is a man who has become a member of the land and naval forces through the operation of the Selective Service System."

Selective Service Regulations, Executive Order 8574, promulgated by the President October 22, 1940.

It is plain from a review of the pertinent portions of the Act and Regulations here involved that the application of the said Sartor (already a member of the armed forces) to the local draft board for the board's approval of Sartor's request of his military superior officers to extend the period of his expiring furlough was not a matter that could be said, under the law, to be pending before the said draft board in its official capacity, because the draft board had no jurisdiction over the subject Sartor (already a member of the armed forces), nor did said local draft board have any jurisdiction over the subject matter, to wit, the request for an extended furlough from the United States Army.

The word "furlough" is defined in Webster's New International Dictionary, as follows:

"1. Leave of absence; esp. leave of absence given to a soldier to be absent for a certain time. In the United States Army furloughs are given only to cadets and enlisted men, officers being granted leave of absence. In the United States Navy a furlough is an extended leave of absence, or a suspension from duty by executive order, on half leave of absence pay, given only to an officer."

We will next consider the powers and duties of the office of government appeal agent, held by the Defendant Cohen under the Act and Regulations here involved, for the purpose of determining whether or not he had the official capacity, under the allegations of the indictment, to violate Section 207 of Title 18, U. S. C.

The Selective Service and Training Act of 1940 (Para. 63,036), provides that the President is authorized:

"(2) to create and establish a Selective Service System and shall provide for the classification of registrants and persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System *civilian local boards* and *agencies of appeal* as may be necessary to carry out the provisions of this Act.

"Appeal boards and Agencies of Appeal within the Selective Service System shall be composed of civilians who are citizens of the United States."

Selective Service and Training Act, Para. 63,036.

Under Paragraph 63,511.11 of the *Selective Service Regulations* (Executive Order No. 8545, October 15, 1940), it was officially declared:

"In general, the elements operate as follows: The election machinery, or other designated agencies, accomplishes the registration. The local board classifies the registrants, and has assigned to it a physician to make physical examinations, and a government appeal agent to protect the interest of the government and the registrants. An advisory board for registrants is appointed to advise and assist registrants in filling out questionnaires, making appeals, etc. * * *."

APPENDIX D.

[Testimony of H. J. Ross; Tr. of R. p. 271 *et seq.*]:

H. J. ROSS,

called as a witness by and on behalf of the defendants, being first duly sworn, testified as follows:

(This witness was examined prior to the cross-examination of Albert Charles Schnee, but for the sake of clarity the said Schee't testimony was set forth in continuity.)

Direct Examination

By Mr. Balter: [149]

I am an attorney at law. I have practiced in this city thirteen years. I am a member of the firm of Pacht, Pelton, Warne and Ross. Some time in the evening of March 6, 1943, I received a telephone call suggesting that I communicate with Room 40 of the City Hall of the police department and find out on what charge Mr. Schnee was being detained. I made inquiry as to whether Mr. Schnee was there. I made inquiry of Lieutenant King of the Los Angeles Police Department, or Captain Rieber from the Detective detail of the Los Angeles Police Department, of a number of men who had been pointed out to me by Lieutenant King as being members of the Federal Bureau of Investigation, and of anybody around the premises who I thought might be able to give me some information. There was no common response. From Lieutenant King I was informed that Mr. Schnee had been turned over to the members of the Federal Bureau of Investigation. From Captain Rieber I was given the same report, after he had talked with Lieutenant King. From the men who had been pointed out to me as being

members of the Federal Bureau of Investigation I was told that they never heard of the *men* and I knew nothing at all about him. Mr. Barr was there too. I had with me at that time in my pocket the draft card of Mr. Schnee. The purpose of my going there was to give the draft card to whoever wanted it. I spent until 2:00 a. m. of Sunday morning at the Police Department trying to find out if Mr. Schnee was there. I was never able to see Mr. Schnee that night, so the draft card remained with me until I left. I informed somebody at the Police Department that I had Mr. Schnee's draft card with me and the purpose of my having it with me. I informed the *man* who were pointed out to me as being members of the F. B. I. at the Police Department of the same thing. They told me they never heard of him. Then I called the F. B. I. headquarters in the Security Building at 5th and Spring Streets on the telephone. I called; I couldn't get into the building. I went to the building and I wasn't able to get into the elevator, so I just didn't make any further attempt. I reached [150] the F. B. I. by telephone on a number of occasions. I talked to a young l ly on the telephone and told her I was an attorney, that I had been advised Mr. Schnee was being held in the custody of the F. B. I. and I wanted to make some inquiry as to his purpose of being withheld and I wanted to see him. She told me to hold the phone a minute. A gentleman got on the phone. He told me he was the night man on duty, could he help me. And I again stated the purpose of my call and he said he didn't know anything about it. And I told him that I was sure there was such a person in their custody there and I insisted upon making some contact with him. That was the end of one conversation. I called later again. I talked to apparently

the same man that I had talked to before. And I said, "I am sure Mr. Schnee is there; that the information you gave me before is incorrect; and I am going to insist that you do something about it, because I think it is an outrage that a man can't get to talk to his attorney." And I then entered into certain arguments with him concerning what I intended to do, and to which he replied that he was sorry; the F. B. I. didn't want to do anything wrong, but he didn't know of Mr. Schnee. This effort to contact Mr. Schnee kept up until 2:00 in the morning. I was never able to contact Mr. Schnee or to surrender his draft card to anyone requiring it.

Cross-Examination

By Mr. Bledsoe:

I was told by Mr. Schnee's wife that it might be something to do with the Selective Service and that his card was in his wallet at home. I talked to somebody at the police station. At first I asked the F. B. I. men if they had Mr. Schnee. I asked them what the investigation was about. They said they never heard of Mr. Schnee. They didn't say anything about an investigation and I thought of several. I asked them what the trouble was. They didn't tell me anything. They did not say there was no trouble. They said they didn't know who Mr. Schnee was.

Q. You wouldn't have any objection to having Mr. Schnee give [151] a complete statement to the F. B. I. that he wasn't guilty, would you?

Mr. Balter: Just a minute.

The Court: Just a minute. That is an improper question.

(Witness continuing)

On that occasion I was Mr. Schnee's attorney. I appeared on his behalf on the occasion when he was arrested on this charge.

Q. Did you give him any instructions whether or not to make a statement?

Mr. Balter: That is not cross-examination, your Honor.

The Court: It is improper. Objection sustained. It is also a communication between attorney and his client.

(Witness continuing)

I went in the building where the F. B. I. office is. I didn't get up to the F. B. I. office. I think I asked to go up to the F. B. I. office. The elevator man told me I couldn't go up there. I did not ask him whether it was open 24 hours a day or whether it was closed. Then I left. I got his draft card from his wife. I obtained Mr. Schnee's release about 7:00 the next night, after considerable discussion with the United States Commissioner.

Q. Do you recognize any of the F. B. I. agents that you talked to that night at the City Hall?

A. Do I recognize them here?

Q. Yes. Do you see any of them here?

A. The gentleman back of you, I know I have seen him on another occasion.

Mr. Bledsoe: Stand up.

(Mr. Richardson stands as requested.)

The Court: Who is this man?

Mr. Bledsoe: Mr. Richardson.

A. I don't recall whether I saw him that night or not. I saw him in court the next day and I know he was—

The Court: That is all, Mr. Richardson. [152]

A. —a member of the Federal Bureau of Investigation. I saw some of the others, but I don't recognize any of them being present in court here.

Q. By Mr. Bledsoe: That night at the City Hall?

A. That is correct.

(Witness continuing)

Lieutenant King told me they were F. B. I. agents. I asked them if they were from the F. B. I. They made no reply. When I asked my question and they said they knew nothing about it, Lieutenant King looked at me and nodded his head this way (indicating). They had told me they knew nothing about it. I look at him and he nodded his head this way (indicating). To me it had a certain significance and I accepted it as such. Lieutenant King told me that he couldn't help me; that he couldn't give me the information I was requesting. I asked him to tell me whether or not Mr. Schnee was there. He said "I turned him over to the F. B. I. and they have got him." I didn't know where they had him. Lieutenant King said he was turned over there at the police station.

(The witness also identified Mr. Wells as a Federal Bureau of Investigation agent who was present at the City Hall that night.)

[Testimony of Albert Charles Schnee, Tr. of R. p. 253 *et seq.*]:

"They put me in a car, and we started to drive toward town. We drove about a half a block away from there, and I said to them, 'Gentlemen, I left my wallet at home, and it just came to me that my draft card is in there,' and I says, 'If it won't be causing you too much trouble I would like to go home and get it.' One of the police officers says, 'How old are you?' I says, 'I am 44.' He says, 'You don't have to worry about your draft card. It is the young fellows they are looking for.'"

". . . Mr. Richardson went out. Then he came back and said, 'Are you Mr. Schnee?' I says, 'Yes, sir.' He says, 'I'm Richardson from the Federal Bureau of Investigation' and showed me his credentials. He says, 'I want to talk to you in a few minutes.' I said, 'Mr. Richardson, would you allow me to call my home?' I was afraid to mention my attorney, because everybody turned me down. I asked the police lieutenant, and I asked Donovan, and they both turned me down. Mr. Richardson said, 'No, I have no objection.' He said, 'What do you want to call her for?' I said, 'I just want to call her and let her know where I am at.' He says, 'I have no objection.' Mr. Richardson let me call my home. Mr. Donovan was on an extension phone listening to the conversation. I said to my wife, 'I am in Room 40.' I knew that my nephew was having dinner at my home that night. We were expecting some guests, and I says, 'Will you have my nephew bring down my wallet. I left

it in the drawer with my car keys, because I have my draft card there, and I think I should have it.' My wife said, 'Yes, I will send them down right away.' "

Finally Mr. Wells said to me, "Do you want to sign a statement that you got this money from this man?" I says, "No." "Why not?" "That statement isn't true." "All right, don't do it." Then he says, "I am going to lock you up," and the way I felt then I did not care what he did to me. I said to him, "Why, you have no charge placed against me. I don't know why you are going to lock me up." He says, "Have you got your draft card with you?" I says, "Look, you were at the police station. You know I called to get my draft card, and I am sure my nephew is there with my draft card. You were pushing me from one room to another, to avoid his giving me my draft card, and now you ask me if I haven't got my draft card." I says, "You know I haven't got my draft card." He says, "Then that is what we are going to lock you up about." I says, "You are the boss. I haven't anything to say." They locked me up that morning about 3:00. I knew that I was booked on a charge that I did not have a draft card. That was before the United States Commissioner on Monday. The case was put over by Mr. Bledsoe in order to check the Draft Board to see whether my cards were in order. I had my car there, which they examined, and it was put over I think until Friday, but they dismissed it on Tuesday. I was actually released from the County Jail on bond Sunday about 7:30 at night. In other words, I stayed in jail from 3:00 in the morning until 7:30 at night on the draft card charge. I was arrested again Monday night. At that time I was arrested on the charge involved in this case.

[Testimony of Harry M. Popkin, Tr. of R. p. 160]:

Q. Did you see Joe Ross down at the auto theft detail?

A. I think I saw somebody. Who is Ross?

Q. An attorney who came down there looking for Mr. Schnee.

A. I think I did.

(Witness continuing)

I saw another gentleman down there looking for Mr. Schnee. I don't know his name. A young man. I don't know how long they were around there, but I imagine they were around there an hour or so. I think Mr. Schnee had been taken down to the F. B. I. At least he was taken out of the auto detail. I don't know just where they took him. They took him out of the auto theft detail office. These people were inquiring for Mr. Schnee. I don't recall what they were told. I think the gentleman in charge of the auto detail talked to him. I think he said he didn't know just where they were.

APPENDIX E.

[Testimony of David A. MacCulloch, Tr. of R. p. 161 *et seq.*]:

DAVID A. MacCULLOCH,

called as a witness by and on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bledsoe:

I am a special agent of the Federal Bureau of Investigation. I was such on March 7, 1943. I did not arrest defendant Schnee on March 6th. He wasn't arrested. He merely accompanied myself and Agent Richardson to the office, at 5th and Spring. I had a conversation with Mr. Schnee.

Q. By Mr. Bledsoe: What did Mr. Schnee say?

Mr. Balter: I object to that, may it please the Court, on the ground that, as we stated yesterday, a conversation between the defendant and any witness after the commission of the transaction is not relevant or material. [75]

The Court: Objection overruled. Exception allowed.

Mr. Cantillon: We will object on behalf of defendant Cohen, on the first ground that it is immaterial; on the second ground, hearsay; on the third ground, no foundation laid.

The Court: So understood. Exception allowed.

Mr. Cantillon: And on the fourth ground, that it is a declaration of an alleged co-conspirator made after the time the conspiracy was terminated.

The Court: Exception will be allowed to the defendant.

(Witness continuing)

First when he was questioned regarding the events of the day of March 6th, the only statement he made was, "I don't know what it is all about. The only thing I can think of, it must have something to do with a car theft." He said, "I was taken to the Auto Theft detail, and this is the only thing I can imagine that is connected with, is the theft of a car." Other than that he stated he knew nothing whatever why he was picked up by the police officer or, in fact, didn't know a thing about the whole transaction during the day.

I asked him if he called Mr. Popkin. He told me that he did. He told me that he called him once around 12 or 1 o'clock. He said he called for Leo Popkin, to buy him some Bafflin cigars, and that he called the theatre; the girl answered the phone and told him, "Mr. Leo Popkin will be out until 3:00 o'clock." And he said, "Thanks" and hung up. And he stated that that was the entire extent of his conversation. I asked him if he had talked to Harry Popkin on the telephone that day. He stated that around 4 o'clock he was given a note with a number on it by, I believe it was the chief at the Fox Studios, who told him he should call that number immediately; that it was very important; and Mr. Schnee stated that he didn't know the place to which this number ran, but that it was different from the number he had called in the morning when he asked for Leo Popkin; [76] that he called this number and had a conversation with Harry Popkin. Mr. Schnee stated that he had known Harry Popkin over a period of some eight years casually, that he had seen him at social events, fights and things of that nature. He stated that he wasn't sure that he could tell Harry Popkin's voice over the phone and that he wasn't

certain how he knew it was Harry Popkin he was talking to, since Harry Popkin got—blew up, so to speak; but he was certain he was talking to Harry Popkin. I asked him if he knew Mr. Cohen. He said that he did. I believe he said for a period of a couple of years. I asked him if he had seen Mr. Cohen that morning or had any conversation with him. He said that he had seen him that morning around 11 o'clock and that Mr. Cohen had seen him at the studio regarding his income tax. Mr. Schnee's income tax. I asked Mr. Schnee if he would care to sign a statement. He stated that he didn't care to unless advised to do so by this attorney. That is the gist of the conversation I had with him.

Cross-Examination

By Mr. Balter:

I never permitted him to call his attorney: Nor did I charge him with any crime at that time before I had this conversation with him. He wasn't held under any charge. He wasn't released. He wasn't held. He was staying there of his own volition up to the time that we decided to book him, which was around 1 o'clock in the morning. I was there with him the greater percentage of the time. Other agents came in and went out. I was there all the time. I believe there were possibly three other agents there. There were no police officers that I saw in our office. I don't recall that he requested to communicate with his family. We didn't file any charges at that time. I wrote the statements down that he made to me and asked if he wished to sign them, and he said he didn't, unless advised to by his attorney. It is a fact that the crime he was charged with was for not carrying a draft card, and I [77] believe that was dismissed before the commis-

sioner the next day. I wouldn't call this charge a subterfuge for holding Mr. Schnee. I would call it that he was charged with a violation of the Selective Service Act of failing to have a draft card. I do not know whether his nephew was down there with his draft card in his pocket.

Cross-Examination

By Mr. Cantillon:

Mr. Schnee accompanied Mr. Richardson and myself to the bureau office; he was placed in one of the rooms there and I talked to him. We left the City Hall through the window.

The Court: Mr. McCullough, do I understand if you have a man under investigation and talk to him and he asks to call his attorney, that you don't permit him to do it, or didn't in this case?

A. I frankly don't recall him requesting to call his attorney. I can't say for sure. I know he didn't call.

The Court: I am quite surprised that a citizen charged with anything wouldn't be permitted to call his attorney if he wanted to.

A. At that time he wasn't charged with anything. We were merely trying to obtain from him the facts of the case, and in accordance with that he told us he was attempting to give us the facts of the case.

By Mr. Balter:

(Witness continuing)

It is my knowledge it is not a fact that Mr. Joseph Ross, Attorney at Law, phoned while I was there and asked to see Mr. Schnee, and I didn't let him up there. To my knowledge he didn't. He may have. I didn't talk

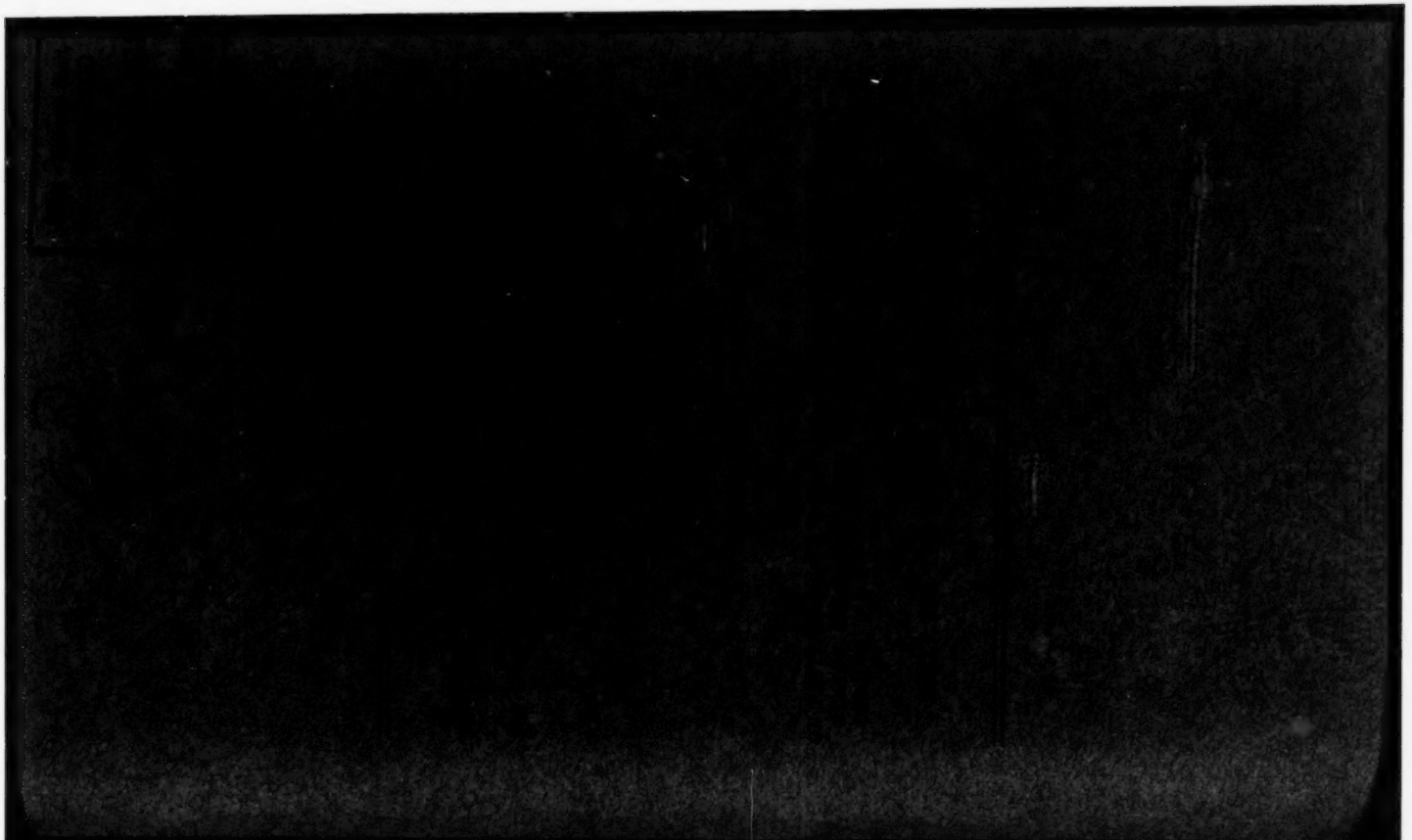
to Mr. Ross and I personally don't know. I don't know who answered the phone when Mr. Ross called. There is always an agent on night duty. There is a girl on the switchboard. There are agents which are assigned to the reception room. Any [78] one of them might have taken it. I can't say for sure who the agent was who might have answered the phone that night. It might have been the agent that was on night duty. Mr. Wells was there and Mr. Richardson was there. It is possible that the call may have come in to either Wells or Richardson, I don't know.

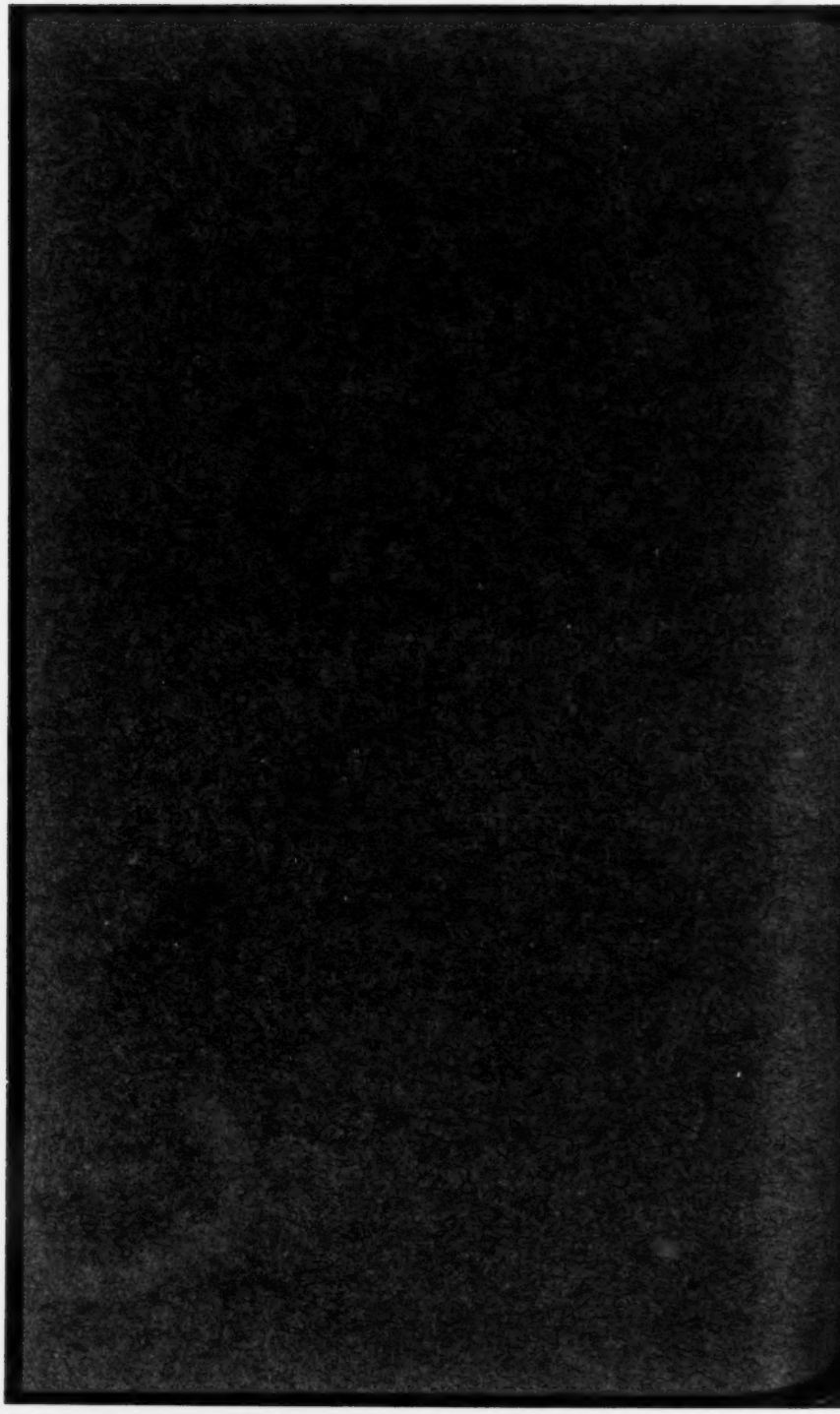
Mr. Balter: If the court please, I would like to make a motion on behalf of the defendant Schnee that all the testimony of this witness regarding a conversation with the defendant Schnee be stricken and the jury be instructed to disregard it, on the ground that the defendant was not permitted his constitutional rights of talking to his attorney and that the statement was taken from him before any charge was filed against him relating to the case.

The Court: Motion denied.

Mr. Balter: Exception.







INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	9
Conclusion	23
Appendix	24

CITATIONS

Cases:	
Benson v. *Henkel*, 198 U. S. 11	14
Billings v. *Truesdell*, 321 U. S. 542	10, 12
Cohen v. *United States*, 294 Fed. 498, certiorari denied, 264 U. S. 584	14
Crinnian v. *United States*, 1 F. (2d) 643	14
Daniels v. *United States*, 17 F. (2d) 339	14
Falbo v. *United States*, 320 U. S. 549	11
Fall v. *United States*, 60 App. D. C. 124, 49 F. (2d) 506, certiorari denied, 283 U. S. 867	15
Fisher v. *United States*, 8 F. (2d) 978, certiorari denied, 271 U. S. 666	16
Haas v. *Henkel*, 216 U. S. 462	14
People v. *Lafaro*, 250 N. Y. 336	15
United States v. *Birdsall*, 233 U. S. 223	14
United States v. *Goldstein*, 135 F. (2d) 359	16
United States v. *Mitchell*, 322 U. S. 65	18, 21, 22
United States v. *Woods*, 66 F. (2d) 262	16
Statutes and Regulations Involved:	
Section 37 of the Criminal Code (18 U. S. C. 88)	24
Section 117 of the Criminal Code (18 U. S. C. 207)	10, 13, 14, 24
The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 301–318):	
Sec. 10 (a)	25
Sec. 10 (a)(2)	10, 25

623712—44——1

Statutes and Regulations Involved—Continued.

	Page
Selective Service Regulations:	
603.54	11, 26
603.71	12, 27
617.1	27
622.15	11, 28
622.15 (a)	28
622.15 (b)	29
Miscellaneous:	
Miller, *Handbook of Criminal Law*, p. 474	15
Selective Service System—	
Local Board Memorandum No. 80	12, 29
Memorandum to all State Directors No. 1–415	12, 33
Memorandum to all State Directors No. 1–423	34
State Director Advice No. 204	12, 36

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 723

EMANUEL MAX COHEN AND ALBERT CHARLES SCHNEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 386–399) is reported at 144 F. (2d) 984.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 29, 1944 (R. 399–400). A petition for rehearing was denied November 6, 1944 (R. 400). The petition for a writ of certiorari was filed December 2, 1944. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal contentions raised by the petition for a writ of certiorari are:

1. Whether in the circumstances presented by the case certain actions of petitioner Cohen, a Government Appeal Agent in the Selective Service System, and of the local draft board to which he was attached were within their official capacity within the meaning of Section 117 of the Criminal Code (18 U. S. C. 207).

2. Whether the trial court erroneously received in evidence certain statements made by petitioner Schnee, on the theory that they were statements by a coconspirator regarding the conspiracy made during the existence of the conspiracy.

3. Whether the admission in evidence of certain oral statements made by petitioner Schnee under circumstances claimed to render applicable the rule of *McNabb* v. *United States,* constituted reversible error.

STATUTES AND REGULATIONS INVOLVED

The applicable statutory provisions and Selective Service Regulations, as worded at the times in question, are set forth in the Appendix, *infra,* pp. 24–29.

STATEMENT

On March 31, 1943, petitioners were indicted in the District Court of the United States for the Southern District of California in two counts (R. 2–7). Count one (R. 2–5) charged that on March 6, 1943, there was pending before Local Board No. 199, Los Angeles, California, an application by one James L. Sartor, a Selective Servive registrant who had already been inducted into the Army, for a recommendation by the board to the Army that his furlough be extended; that petitioner Cohen was the Government Appeal Agent attached to the local board; and that petitioners on or about March 6, 1943, unlawfully conspired with intention to defraud the United States "by endeavoring to corruptly obstruct, impede, hinder, impair and interfere with the due administration of the proper and lawful function of the United States Army in the granting or denying of an extended furlough to" Sartor, in that for a sum of money petitioner Cohen, as Government Appeal Agent, would endeavor to corruptly obtain from the local board a favorable recommendation with respect to Sartor's furlough application, in violation of Section 37 of the Criminal Code (18 U. S. C. 88). Count two (R. 5–7), incorporating by reference the facts alleged in count one, charged that petitioners unlawfully conspired to violate Section 117 of the Criminal Code (18 U. S. C. 207) by asking for money from Sartor for the

purpose of influencing the action of petitioner Cohen in the performance of his official duty as a Government Appeal Agent in respect of Sartor's application for a recommendation relating to his request for a furlough extension. Petitioners were convicted on both counts (R. 20–21), but judgment was entered only on the second count. Petitioners were each fined $2,500 and sentenced to imprisonment for nine months (R. 28–32). On appeal, after rehearing, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (R. 399–400).[1]

The evidence in support of the judgment may be summarized as follows:

Sartor, a Selective Service registrant with Local Board No. 199, Los Angeles, California, was inducted into the United States Army on October 14, 1942. At the time of his induction he was given a short furlough and thereafter was granted various extensions until March 8, 1943, when he was to report for active duty (R. 67–68). The purpose of the furloughs was to enable him to dispose of his holdings, a retail liquor store, a bar,

[1] On May 19, 1944, the Circuit Court of Appeals, Judge Healy dissenting, reversed the conviction on the ground that petitioner Cohen's official duties as Government Appeal Agent did not include authority to recommend an extension of furlough for a registrant already inducted into the Army (Pet. 41–50). On June 17, 1944, the court granted the Government's petition for rehearing (R. 384–385). On September 29, 1944, it affirmed the judgment of the District Court (R. 385).

and an equity in an apartment house, without financial loss. On February 11, 1943, Sartor requested an additional 60 days' deferment from active duty by letter addressed to Major General Joyce of the Ninth Service Command, Fort Douglas, Utah (R. 68–69), and was advised by letter from Lt. Col. A. E. Merrill of that Command that a recommendation from his local Selective Service Board would be necessary to secure a further extension (R. 70, 71). At the direction of his local board (R. 71), Sartor went to the place of business of petitioner Cohen, the Government Appeal Agent, on Monday, March 1, 1943, and showed him Lt. Col. Merrill's letter suggesting that he obtain the draft board's recommendation with regard to his application for a further furlough (R. 72). Cohen instructed Sartor to appear at the draft board headquarters that evening. When Sartor appeared at the board's office he was interviewed by Cohen, who dictated a letter as Government Appeal Agent to the Army authorities describing Sartor's property holdings and financial position and stating that Sartor requested an extension of his furlough on the basis of those facts. The letter was posted by Sartor on the following day (R. 71–74) and on the same day Sartor again called on Cohen and told him that the letter was not "any good" because it did not contain a recommendation. Cohen then advised Sartor that he had no authority to make a recommendation. On

the following day Sartor again went to see Cohen, requesting a recommendation, and Cohen again advised him that he had no power to make a recommendation. (R. 75.)

Sartor did not see Cohen again until the following Saturday morning, March 6, 1943, when at about 11:00 a. m. Cohen stopped at Sartor's place of business in his automobile, blew his horn, and when Sartor came out stated to him that he had someone by the name of "Davis" who was going to help him get an extension from the Army and that "Davis" would telephone him in about 10 or 15 minutes about getting the extension (R. 75, 76). Shortly thereafter Sartor received a telephone call from "Davis", who told Sartor that a 60-day extension would cost $2,000 (R. 76, 78–79). Sartor told him he thought the price was too high, but that he should call him again (R. 79). About one hour later Cohen again appeared in his car outside of Sartor's place of business, blew his horn, and when Sartor came out drove him around the block in Cohen's car. When Sartor entered the car Cohen asked, "Did he call you up?" Sartor related his conversation with "Davis" and Cohen stated that he had nothing to do with the transaction. Cohen then described "Davis" to Sartor and said that "Davis" would "come down and see" Sartor (R. 79–80). Cohen did not advise Sartor that the draft board had just decided to recommend a 30-day extension of Sartor's fur-

lough and that a wire to this effect already had been sent to the Army authorities (R. 81).

"Davis" again telephoned Sartor at about one o'clock on the same day and promised to see what he could do for him for $500 (R. 81). "Davis" called Sartor a third time an hour later and informed Sartor he could get him a 30-day furlough for $500. He instructed Sartor to put the money in an envelope and to deliver it to a Mr. Popkin, the manager of a nearby theater, at about 2:30 o'clock that day. Because Sartor did not have enough money on hand, "Davis" agreed to a partial payment. (R. 82, 83, 106–107.) Sartor complied with "Davis' " instructions, but before doing so apprised one Donovan, a detective from the Los Angeles Police Department, of the developments (R. 83–85). As soon as Sartor delivered the envelope containing the money, Donovan presented himself to Popkin and requested delivery of the envelope. About one hour later, after he had called his attorney and talked on the telephone with an official of the Los Angeles Police Department, Popkin surrendered to Donovan the envelope given him by Sartor (R. 147–149). Donovan opened it and found in it the money placed there by Sartor. (R. 114–115.)

Popkin testified that petitioner Schnee with whom he was friendly had called him early in the afternoon of March 6, 1943, and asked him to accept delivery of an envelope for him. Schnee

told Popkin that the envelope would be addressed to a "Mr. Davis" and would be delivered at approximately 3 o'clock and that "the man delivering the envelope knew him [Schnee] as Mr. Davis." (R. 144–145.) Popkin received the envelope from Sartor at the request of Schnee and testified that after he had surrendered it to Donovan, he told Donovan he would call the man known as "Mr. Davis." He called Schnee's home and left a message with his wife. In response to that message Schnee thereafter called Popkin and they conversed concerning the envelope while Donovan listened on another telephone. (R. 115–117, 148–149.) Immediately thereafter Schnee was interviewed by Donovan and others (see *infra*, p. 16). He denied having any part in the bribery scheme, but admitted that he knew petitioner Cohen (R. 150). At this point he was placed under arrest (R. 123).

Testifying in his own defense petitioner Cohen stated that he had been appointed Government Appeal Agent in September 1940 and had acted in that capacity through the period in question here (R. 202); that "it is my job to present matters for registrants" (R. 228); that Sartor's local board referred the matter of Sartor's recommendation to him and that it was his function to present Sartor's application to the draft board (R. 214, 224); that when the Sartor matter was first presented to him, he requested the clerk of the draft board to communicate with the Coor-

dinator of Selective Service to determine "whether the Board had jurisdiction to entertain such a recommendation" (R. 209), and that he was thereafter informed that the Coordinator had advised that the board possessed jurisdiction to make a recommendation in Sartor's case (R. 209); that when Sartor consulted him on March 4, 1943, "I told him that the Board had jurisdiction; that I will present it to them * * * at a meeting on Saturday morning" (R. 209); that he suggested to the board that it meet on Saturday morning, which was not its regular meeting time (R. 226); and that on Saturday "I went down for the sole purpose of presenting Sartor's name, he was so insistent, and talked so persistently I brought the matter up" (R. 227).

While these events were taking place, the Army authorities received the letter written by petitioner Cohen as Government Appeal Agent (*supra*, p. 5) and, regarding it as a favorable recommendation from the local board, granted Sartor another sixty-day furlough (R. 178). When it was discovered that Cohen's letter was not the recommendation of the board and that the board had thereafter recommended only a thirty-day furlough, the sixty-day furlough which had been granted was immediately canceled by the military authorities (R. 179–180).

ARGUMENT

1. Petitioners' basic contention (Pet. 21, 31) appears to be that the alleged conspiracy did not

relate to any of Cohen's official duties and hence could not be a conspiracy to violate Section 117 of the Criminal Code. Petitioners argue that when Sartor was inducted into the armed forces his local board's jurisdiction over him and Cohen's official duty as Government Appeal Agent in respect of him ended. We submit that, in the light of the relationship which exists between the Selective Service System and the armed forces, (a) Cohen's and the local board's actions, which the solicited bribe was to influence, were within their authority, and (b) petitioners conspired to commit an offense under Section 117 of the Criminal Code even if, strictly speaking, the functions performed by the Selective Service System in relation to post-induction furloughs are beyond its authority.

In the words of this Court in *Billings* v. *Truesdell*, 321 U. S. 542, 547, "the mobilization program established by the Selective Service System is designed to operate 'as one continuous process for the selection of men for national service'—a process in which the civil and military agencies perform integrated functions." This Court there was concerned with those phases of the process of selection which precede induction; but we think its characterization of the relationship of the Selective Service System to the armed forces is equally applicable to the functions of the System after a registrant has been inducted.

Section 10 (a) (2) of the Selective Training and Service Act (*infra*, p. 25) empowers local boards

to hear and determine "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service" under the Act "of all individuals within the jurisdiction" of the boards. Under Selective Service Regulation 603.54 (*infra*, p. 26) the jurisdiction of each local board extends to all persons registered in or subject to registration in the area for which it was appointed. The local board's functions do not end with its selection of registrants for military service in the manner summarized in *Falbo* v. *United States*, 320 U. S. 549. It does not strike a registrant from its rolls upon his induction but is required to reclassify him I–C (member of land or naval forces); he remains registered with it. Selective Service Regulation 622.15 (*infra*, p. 28). The armed services may invoke the assistance of local boards in dealing with matters lying within their competence after induction, as the Army did in this case in suggesting that Sartor obtain the recommendation of his board with reference to the extension of his furlough. As Colonel Merrill testified (R. 177), "if we did otherwise * * * the effect would be to nullify the procedure of the Selective Service system in ordering a man in."[2]

[2] In respect of the reliance of the military authorities on the recommendation of the registrant's local board Colonel Merrill's letter to Sartor (R. 70) explained the procedural requirement as follows:

> It is suggested that you present a copy of this communication to your Local Board, and ask them to make their

Pursuant to the Act and regulations, official memoranda of the Selective Service System, cited in the opinion of the court below (R. 391–392), have continuously recognized and provided for functions of local boards with respect to registrants who have been inducted into the armed forces. Local Board Memorandum No. 80, issued on January 10, 1942 (*infra*, pp. 29–33), imposes upon local boards the duty to cooperate with the military authorities in connection with the separation of inducted men from active military service and their transfer to the Enlisted Reserve for proper reason. Memoranda Nos. 1–415 and 1–423 to State Directors, dated April 17 and May 18, 1942 (*infra*, pp. 33–36) and State Director Advice No. 204, dated May 8, 1943 (*infra*, pp. 36–37) impose similar duties with respect to post-induction furloughs and post-induction stays of active service for newly drafted men.[3]

Paragraph 603.71 of the Selective Service Regulations (*infra*, p. 27) provides for the Govern-

---

recommendation through the State Director of Selective Service, Plaza Building, Sacramento, California. It is the function of the Selective Service System to register, classify, and deliver for induction men who are considered eligible and qualified for such procedure. It is not consistent that the War Department should nullify the action of the Selective Service System by unduly extending the deferment status of individuals selected for service. Hence the procedure suggested above.

[3] As this Court noted in *Billings* v. *Truesdell*, 321 U. S. 542, 554, the induction procedure has again been changed to eliminate post-induction furloughs and stays in ordinary cases.

ment Appeal Agent to undertake investigations "after classification" of registrants, with respect to matters submitted by the local board, and "to impart to the local board * * * information which in his opinion ought to be investigated." Petitioner Cohen caused an inquiry to be made of the Coordinator of the Selective Service System concerning the power of the local board to make a recommendation in Sartor's case (*supra,* pp. 8–9) and was advised that it was vested with authority to do so. The board acted upon his suggestion. In causing the board to meet and consider Sartor's request that an additional furlough be recommended, he was legally as well as *de facto* (in the words of Section 117 of the Criminal Code, *infra,* p. 24) "acting for or in behalf of the United States, in any official capacity, under or by virtue of the authority of * * * [a] department or office of the Government * * *."[4] He acted

[4] We perceive no merit in petitioners' assertion (Pet. 31) that since the Army mistakenly granted Sartor a furlough prior to March 6, 1943, the day the draft board met (see *supra*, p. 9) there was no valid basis for count two of the indictment, as the matter for which the official action was to be sought had already been accomplished. Regardless of whether the local board's recommendation would have had any operative effect, there is no question that the board might make a recommendation to the Army or that petitioner Cohen in his official capacity as Government Appeal Agent participated in the presentation of the matter to the local board. In these circumstances a conspiracy to obtain a bribe to influence Cohen's official action was a conspiracy to violate Section 117 of the Criminal Code.

officially when he interviewed Sartor at the board's office and evidently had reference to further official action in his subsequent dealings.

The court below properly took judicial notice of "the general system which * * * has now been in force and operation throughout the country for several years" (*Crimmian* v. *United States*, 1 F. (2d) 643, 644 (C. C. A. 6)), in determining the official nature of the actions to which the bribe was to relate. In order to constitute official action within the purview of Section 117 of the Criminal Code (18 U. S. C. 207), it is not required that the action be prescribed by statute, but sufficient that it come within the authority and practice of the agency which the officer is serving. *United States* v. *Birdsall*, 233 U. S. 223; *Haas* v. *Henkel*, 216 U. S. 462; *Benson* v. *Henkel*, 198 U. S. 11; *Daniels* v. *United States*, 17 F. (2d) 339 (C. C. A. 9); *Cohen* v. *United States*, 294 Fed. 488 (C. C. A. 6), certiorari denied, 264 U. S. 584. In the *Birdsell* case this Court stated that it is not "necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. * * * In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the

provisions of the above-mentioned statutes against bribery." 233 U. S. at p. 231.

Even if it were thought that functions relating to Sartor's furlough were beyond the legal authority of the local board and of Cohen, the offense of bribery under Section 117 of the Criminal Code and conspiracy to bribe might be committed with respect to them. It is sufficient if the official in question "acted under color of authority," at least if he "was a de jure officer occupying at the time a lawful office * * *, * * * acting in a de facto capacity." *Fall* v. *United States,* 60 App. D. C. 124, 49 F. (2d) 506, 509, certiorari denied, 283 U. S. 867. Such is the prevailing doctrine with respect to the crime of bribery. Miller, *Handbook of Criminal Law,* p. 474. It cannot be doubted that Cohen's acts were "under color of authority" in this sense. At the very least, he acted "corruptly in a matter to which he * * * [bore] some official relation". *People* v. *Lafaro,* 250 N. Y. 336, 342 (1929).

2. Primarily on the theory that the conspiracy had already ended, petitioners contend (Pet. 33–36) that the trial court committed reversible error in receiving in evidence testimony relating to oral statements made by petitioner Schnee when he was first questioned at his place of employment, prior to his removal to police headquarters. Since it is clear that the object of the conspiracy had not been accomplished at the time the statements were

623712—44——3

made and that the bribery scheme was still operative except as it had been frustrated without the knowledge of the parties, we submit that petitioners' contention is without merit.

The contention has reference to Schnee's conversation with Donovan, Popkin, and one Barr immediately after the incident at Popkin's theater when Sartor's envelope was recovered (*supra*, p. 7). Donovan, Popkin, Barr, and Popkin's wife called on Schnee at his place of employment at about 4:30 p. m. on March 6, 1943, about two hours after Sartor had delivered part of the bribe to Popkin (R. 130). In the course of their conversations with Schnee he denied that he had had any part in the bribery scheme or that he had initially called Popkin earlier in the day. He admitted that he knew Cohen and that he had seen him on the morning of that day, but he claimed that he saw him with respect to an income tax matter. (R. 117–123; 130–133; 150–151.) At this point, Donovan advised Schnee "that I was going to take him up town to the police station" (R. 123).

We think it is clear that Schnee's statements were those of a conspirator seeking to conceal the conspiracy and, as such, were admissible against both petitioners. *United States* v. *Goldstein*, 135 F. (2d) 359 (C. C. A. 2); *United States* v. *Woods*, 66 F. (2d) 262 (C. C. A. 2); *Fisher* v. *United States*, 8 F. (2d) 978 (C. C. A. 1), certiorari denied, 271 U. S. 666. Contrary to petitioners' contention at the trial (R. 121), the delivery of

the money by Sartor to Popkin did not accomplish the object of the conspiracy, which was the receipt of $500 by Cohen and Schnee. At the time of Schnee's statements none of the money had been received by petitioners. Sartor had delivered $155 to Popkin (R. 84; see *supra,* p. 7), but even that money was recovered before it reached petitioners. When he was interviewed, petitioner Schnee plainly did not regard the conspiracy as being at an end. In these circumstances, aside from the fact, pointed out by the Circuit Court of Appeals (R. 399), that Schnee's statements were not prejudicial evidence since he testified to the same effect at the trial, we submit that the trial court properly concluded that the statements were made prior to the termination of the conspiracy and were therefore admissible against both petitioners.

3. Finally, petitioners contend (Pet. 37–38) that the trial court committed reversible error in receiving in evidence the testimony of F. B. I. agent MacCulloch as to statements made by Schnee while in custody, but prior to arraignment. Particularly, petitioners complain of MacCulloch's testimony that Schnee refused to sign a statement unless advised to do so by his attorney. Consideration of the circumstances surrounding Schnee's examination prior to arraignment and of the fact that his statements were of an exculpatory nature compels the conclusion, in our view, that "the foundation for appli-

cation of the *McNabb* doctrine are here totally lacking." (*United States* v. *Mitchell*, 322 U. S. 65, 69.) For it is clear that Schnee's oral statements were not secured during a period of illegal detention and that petitioners' convictions do not rest, in any sense, on the statements.

As we have shown, *supra*, pp. 8, 16, after Schnee was interviewed at his place of employment, he was advised by detective Donovan that he would have to accompany him to the Los Angeles police station. At Schnee's request they first proceeded to his home, where he left his automobile, and where he saw his wife (R. 123). He told her that he was going to police headquarters for questioning (R. 252–253). At this point, shortly after 5:00 p. m. on Saturday, March 6, 1943, Donovan called the Federal Bureau of Investigation into the case since it involved a violation of federal law (R. 124, 127, 133, 151). Schnee testified that the agents arrived at police headquarters shortly after 7:00 p. m. (R. 255). There is nothing in the record showing any interrogation of Schnee by the agents until almost 10:00 p. m., at which time they requested him to accompany them to the F. B. I. office "so that we could get the story in this case" (R. 277). Schnee replied, "I will be very glad to go along and tell you what I know" (R. 277, 260). Schnee and the F. B. I. agents, accompanied by Popkin, Sartor, Donovan, and three other persons who apparently were witnesses, proceeded to the F. B. I. office, arriving

there at approximately 10:00 p. m. (R. 151, 257, 281).

Schnee testified that at a time not precisely stated he requested and received permission from the F. B. I. agents to telephone his wife. He did not seek to call an attorney (R. 256, 268). The agents then proceeded to examine each of the persons present, none of whom had as yet been arrested (R. 161, 260, 278), concerning the case (R. 279). In respect of the interrogation of Schnee, Agent Wells testified (R. 278–279), "I advised Mr. Schnee that we were interested in getting his story in this case; wanted to hear what he had to say about it. I advised him at that time that he did not have to make any statement; I advised him that he did not have to say a word unless he had talked to his attorney, or unless he wanted to. I advised him at that time that anything he did say would be used against him in court. He said, 'I will be glad to tell you fellows anything you want me to.'" Schnee denied any knowledge of illegal acts (R. 162). He admitted that he had called Popkin at 4:00 p. m. in response to his telephone message (*supra*, p. 8) and that he knew Cohen and had seen him that morning with regard to an income tax problem; but he denied knowing Sartor (R. 163–164, 257). Schnee declined to sign a statement unless he was advised to do so by his attorney (R. 164; see also R. 258).

During the interrogation of Schnee it was established that in violation of Selective Service Regulation 617.1 (*infra*, pp. 27–28), he did not have in his possession a selective service registration card (R. 279). Either at 1:00 a. m. or at 3:00 a. m. in the morning (on Sunday, March 7, 1943) (R. 164, 258), he was arrested on a charge of not possessing such a card and was placed in jail. He was not questioned further. At 8:00 a. m. on Sunday the United States Attorney authorized the issuance of a complaint charging Schnee with failure to have his draft registration card in his possession (R. 279–280). At an unspecified time during the day he was arraigned before a United States Commissioner and at 7:00 p. m. he was released from custody on bond (R. 274, 259). On Monday, July 8, 1943, the United States Attorney authorized the issuance of a complaint on the present charges and Schnee was rearrested at that time (R. 259, 280), but there is no evidence that he was questioned further. Schnee testified that during the period of interrogation of from three to five hours he was questioned only intermittently and that he slept a part of the time (R. 258).

The only sharply disputed evidence in respect of petitioner Schnee's detention concerns the efforts of an attorney to reach him at the F. B. I. office Saturday evening. Ross, an attorney, testified that he was asked to inquire into Schnee's detention; that the Los Angeles police referred

him to the Federal Bureau of Investigation; that he was unable to gain entrance into the building containing the F. B. I. office; and that he telephoned the F. B. I. office but was advised that they had no knowledge of Schnee (R. 271–273). F. B. I. agent Wells,[5] on the other hand, testified that all persons were free to come to the F. B. I. offices at night; that "there is a night bell there, and the elevator operator, who works for the building, will bring them up, and they push that bell or knock at the door that adjoins the bell. There is an agent in the reception room, and a clerk is there also, right at the switchboard;" that he received no telephone call from Ross on the night in question; and that while he was at the Los Angeles police station, no one inquired of him concerning Schnee's whereabouts (R. 278, 281; see also, R. 165–166).

Upon its facts this case is unlike the *McNabb* case and more closely resembles *United States* v. *Mitchell*, 322 U. S. 65. As in the *Mitchell* case, Schnee was anxious immediately to state to the F. B. I. agents his version of the pertinent events, undoubtedly in the hope that he might clear himself. He testified that "I told the F. B. I. that I would make a complete statement and tell them all I knew about it" (R. 260). Moreover, as in

[5] Schnee testified (R. 268) that while he was at the F. B. I. office agent Wells talked on the telephone with Ross and that Ross was informed that Schnee was not there.

that case, the statements admitted in evidence were not obtained by reason of coercion of any kind unless the time of questioning itself, from three to five hours, is deemed coercive. Schnee was arraigned promptly on Sunday before a United States Commissioner and released on bond. Even if there had been unreasonable delay in arraignment, that fact would not operate retroactively to render inadmissible the evidence which had been properly obtained. *United States* v. *Mitchell, supra.*

The statements which the agent, MacCulloch, testified Schnee made, moreover, were not essentially different from the statements which he made when he was first interviewed at his place of employment; and these had already been received in evidence at the time MacCulloch testified (R. 150–151, 163–164). Therefore the error, if any, in admitting MacCulloch's testimony regarding these statements was not prejudicial.

Petitioners' complaint rests also upon the admission in evidence of testimony regarding Schnee's refusal to sign a written statement. Petitioners' view (Pet. 37–38) appears to be that a refusal to sign a statement is akin to the omission of a criminal defendant to testify and should therefore not be referred to at the trial. This argument, however, does not aid the petitioners, since both of them testified in their defense and therefore overcome any possible adverse inference from the refusal to sign a statement. They were

not prejudiced by evidence of conduct on Schnee's part which was not harmful to their cause in the light of subsequent events.

CONCLUSION

For the reasons stated, we respectfully submit that the affirmance of the judgment of conviction by the court below was free of error. The case presents no conflict or important issue of law, and the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
IRVING S. SHAPIRO,
MAYTE B. GREENE,
Attorneys.

DECEMBER 1944.

APPENDIX

Section 117 of the Criminal Code (18 U. S. C. 207) provides:

> Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United

States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appendix 301–318) provided in part, as follows:

SEC. 10 (a). The President is authorized—* * *

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by

the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee;

* * * * *

The Selective Service Regulations provided in pertinent part:

LOCAL BOARDS

* * * * *

603.54 *Jurisdiction.* The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed and to all persons whose Registration Cards (Form 1) are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law.

* * * * *

GOVERNMENT APPEAL AGENTS

603.71 *Appointment and duties.* (a) For each local board, a government appeal agent shall be appointed by the President, upon recommendation of the Governor. The duties of the person so designated are: To appeal from any classification by a local board which, in his opinion, should be reviewed by the board of appeal; to care for the interests of ignorant registrants and their dependents with respect to appeals and, where the decision of the local board is against the interests of such persons and where it appears that such persons may not take appeals, due to their own nonculpable ignorance, to inform them of their rights and assist them to enter appeals to the board of appeal; and, after classification, to investigate and report upon matters which are submitted for his investigation by the local board. It shall also be the duty of such government appeal agent, where the interests of justice may require, to suggest to the local board a reopening of any case and to impart to the local board any information which in his opinion ought to be investigated. The government appeal agent should expedite the examination of the records of registrants as soon as they have been classified by the local board in order that appeals to the board of appeal, where found necessary, may be filed within the time limit specified in the regulations.

* * * * *

REGISTRATION CERTIFICATES

617.1 *Effect of failure to have Registration Certificate in personal possession.* Every person required to present himself

for and submit to registration must have a Registration Certificate (Form 2) in his personal possession at all times and, upon request, must exhibit it to any law-enforcement officer, any representative of the Secretary of State, any representative of the Secretary of the Treasury, any representative of the Attorney General, any official of National Headquarters for Selective Service, any official of a State Headquarters for Selective Service, any member of a local board or board of appeal, any government appeal agent, and any other official designated by the Director of Selective Service. The failure of any such person to have such Registration Certificate (Form 2) in his personal possession shall be prima facie evidence of his failure to register. Such person upon becoming a member of the armed forces shall surrender such Registration Certificate (Form 2) to his commanding officer who will dispose of it in accordance with the current orders of his service.

* * * * *

CLASSIFICATION

* * * * *

622.15 * * *

(a) In Class I–C shall be placed every registrant who is, or who by induction, enlistment, or appointment becomes, a commissioned officer, warrant officer, field clerk, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Coast Guard, the Federally recognized active National Guard, the Officers' Reserve Corps, the Army of the United States, the Regular Army Reserve, the Enlisted Reserve Corps, the Naval Reserve, the Marine Corps Reserve, or the Coast Guard Reserve

(other than temporary); or a cadet of the United States Military Academy; or a midshipman of the United States Naval Academy; or a cadet of the United States Coast Guard Academy; or a man who has been accepted for admittance (commencing with the academic year next succeeding such acceptance) to the United States Military Academy as a cadet, or the United States Naval Academy as a midshipman, or to the United States Coast Guard Academy as a cadet, but only during the continuance of such acceptance.

(b) A registrant who enlists or is inducted into the land or naval forces, other than by volunteering under the Selective Training and Service Act of 1940, as amended, and being inducted through a local board, shall be classified in Class I–C when the local board receives authentic information that such registrant is in the land or naval forces. No Selective Service Questionnaire (Form 40) shall be mailed to such registrant. No credit shall be given for such registrant until the Director of Selective Service receives, from the land or naval forces, a Home Address Report (Form 166), covering such registrant.

Local Board Memorandum No. 80, issued to all local boards January 10, 1942 by the Director of Selective Service, provided in part [Italics added]:

> Previous War Department policy with regard to the separation from active military service of inducted and enlisted men has been amended and new instructions issued under War Department Circular No. 270, provide as follows:
>
> * * * * *

The Selective Service System will be consulted on claims of Dependency, Erroneous Induction, or Importance to National Health, Safety, or Interest.

DEPENDENCY—PROCEDURE FOR SEPARATION

a. Requests for release on account of dependency will be granted only where the evidence submitted clearly indicates that the release of the soldier is necessary to prevent or relieve destitution.

b. Such separation will be made only after the inducted man files a written request with his commanding officer. After investigation by the Red Cross, the commanding officer will make proper disposition of the request for discharge. Local boards will continue to cooperate with representatives of the Red Cross by furnishing such pertinent information as may be available. The recommendation of the local board is desired, but no additional investigation will be made.

c. If such inducted man is separated from active military service by reason of dependency, such separation will be made by transfer to the Enlisted Reserve, and the local board will retain such man in class I–C.

ERRONEOUS INDUCTION—PROCEDURE FOR SEPARATION

a. Erroneous induction shall mean any instance in which the inducted man claims that, in the procedure leading up to his induction, he was denied some legal right, which fact, if established, would render the induction illegal.

b. Such separation will be made only after the inducted man files a written request with his commanding officer, who

will forward the request to The Adjutant General. *When the request is received by The Director of Selective Service from The Adjutant General, it will be referred to the proper local board for report and recommendation. When completed, the report and recommendation will be forwarded to The Director of Selective Service by the State Director, whose recommendation will also be included.*

c. If such inducted man is discharged from active military service by reason of erroneous induction, the separation will be accomplished in such a manner that the man will assume a status as though he had not been inducted, and the local board will then proceed with the classification of such man as it would in the case of any other registrant.

IMPORTANCE TO NATIONAL HEALTH, SAFETY, OR INTEREST—PROCEDURE FOR SEPARATION

a. An inducted man may be separated from active military service by reason of his being necessary to the maintenance of national health, safety, or interest. (In effect this is a claim that the inducted man meets the requirements of Class II–A.)

b. Such separation will be made only after the inducted man files a written request with his commanding officer, who will forward the request to The Adjutant General. *When the request is received by The Director of Selective Service from The Adjutant General, it will be referred to the proper local board for report and recommendation. When completed, the report*

and recommendation will be forwarded to The Director of Selective Service by the State Director, whose recommendation will also be included.

c. If such inducted man is separated from active military service by reason of being necessary to the maintenance of the national health, safety, or interest, such separation will be made by transfer to the Enlisted Reserve, and the local board will retain such man in Class I–C.

RECONSIDERATION OF CLASSIFICATION—PROCEDURE FOR SEPARATION

a. In addition to the reasons for separation listed in War Department Circular No. 270, a man may be separated from active service by reason of Reconsideration of Classification, upon the recommendation of the local board.

b. Reconsideration of Classification as a reason for separation shall refer to any instance in which the inducted man claims that in the process of classification prior to his induction he was placed in an incorrect classification by the local board upon consideration of information inadequate or erroneous in whole or in part.

c. Such separation will be made only after the inducted man files a written request with his commanding officer, who will forward the request to The Adjutant General. Such separation will be accomplished only upon the recommendation of The Director of Selective Service. *When the request is received by The Director of Selective Service from The Adjutant General, it will be referred to the proper local board for report and recommendation. The local board will then consider anew the classification of the*

registrant in light of information now in its possession and will forward the report and recommendation to The Director of Selective Service by the State Director, whose recommendation will also be included.

d. If such inducted man is separated from active military service by reason of reconsideration of classification, such separation will be made by transfer to the Enlisted Reserve, and the local board will retain such man in Class I–C.

Local boards should keep in close touch with men transferred to the Enlisted Reserve, and in the event of a change of status which would make them eligible for active duty, recommendation for order to active military service should be made to the Corps Area Commander through the State Director.

After a man has been inducted into military service he passes into military control and questions concerning his retention in or separation from active service are responsibilities of the War Department. *All final determinations must be made by the military authorities and it is the expressed intention and desire of the War Department that such determinations be made in accordance with the facts presented and in the best interests of all concerned. It is the function of all elements of Selective Service, when called upon through proper channels, to assist the War Department with information and recommendation consistent with the facts.*

Memorandum to all State Directors No. 1–415, dated April 17, 1942, from National Headquarters Selective Service System, reads in part as follows, concerning furloughs:

SUBJECT: FURLOUGHS (IV)

1. The War Department has issued instructions to Corps Area Commanders liberalizing the policy under which furloughs may be granted to inductees. Furloughs will ordinarily be granted for a period of not to exceed ten days and will begin not later than five days after induction. When the soldier lives at a great distance from the reception center, furloughs up to fifteen days may be granted. If more than a day's travel is required, the Induction Officer will be authorized to grant furloughs at the induction station.

2. It is recommended that you immediately get in touch with Corps Area representatives to arrange necessary details. In areas where the distance involved or the transportation facilities make such action advisable, particular attention should be given to arrangements which will permit the furlough of registrants by Induction Station Commanders.

* * * * *

5. Local boards will be directed to atttach to the delivery list the names of those selectees for whom furloughs are recommended. Furloughs will invariably be granted if recommended by the local board.

6. State Directors will make every effort to insure full cooperation with induction stations and Reception Center Commanders. A report of the arrangements in effect in each State, together with copies of all directives to local boards, will be forwarded to National Headquarters.

Memorandum to all State Directors No. 1–423, dated May 18, 1942, from National Headquarters Selective Service System to all state directors, reads in part as follows:

SUBJECT: RELEASE FROM ACTIVE SERVICE FOR FOURTEEN DAYS IMMEDIATELY FOLLOWING INDUCTION (IV)

1. The present policy of granting furloughs to inducted men will be discontinued on June 15, 1942, or as soon thereafter as arrangements can be made by conference with the State Director and the Corps Area Commander. The new procedure will provide that every inducted man will be released from active service at the induction station for a period of approximately fourteen days, unless he prefers to proceed directly to the Reception Center. This will be accomplished by transferring the inducted man to the Enlisted Reserve Corps immediately following his induction and issuing orders recalling him to active service at the end of the fourteen-day period. The Army will furnish transportation, meals and lodging of such reservists en route to the city in which the local board is located and from that point to the Reception Center.

* * * * *

5. Local boards are not responsible for the return of reservists to the Reception Center, since they are under the jurisdiction of the appropriate Corps Area Commander and are individually responsible for compliance with the orders issued. If, however, a reservist is unable to comply with his orders due to sickness or unavoidable reasons, the chairman of the local board will include this information in the telegram to the Reception Center Commander. In such cases, if the reservist reports to the local board at a later date he will be forwarded to the Reception Center on a transportation request issued by the local

board, quoting the Procurement Authority noted on the reservist's order.

6. Many of the disadvantages of the furlough system will be eliminated in this new procedure. Every man who wishes to return to his home will be given the opportunity to do so without being required to establish his reasons for returning. Investigation and recommendation by the local board is no longer necessary. Reservists are released from active service at the induction station instead of the Reception Center. They travel at Government expense in local board groups under an appointed leader. Farewell ceremonies may be arranged at the time the group departs for the Reception Center, since all of the men in such groups have been accepted for military service and ordered to active duty. None will be faced with the embarrassment of returning home following such ceremonies.

State Director Advice No. 204 issued May 8, 1943, by the Director of Selective Service provided in part:

1. Following is an excerpt from a memorandum which has been dispatched by the Adjutant General to the commanding general of each service command:

1. * * * the provisions * * * reducing the normal period between induction and reporting at a reception center from fourteen (14) days to seven (7) days is revoked.

2. At your convenience, but prior to July 1, 1943, the period in the Enlisted Reserve Corps will be extended to fourteen (14) days and prior to September 1, 1943, this period will be extended to twenty-one (21)

days. These changes as directed will, after conference with State Directors of Selective Service, be accomplished gradually and in such maner as to cause the minimum interference with current processing schedules.

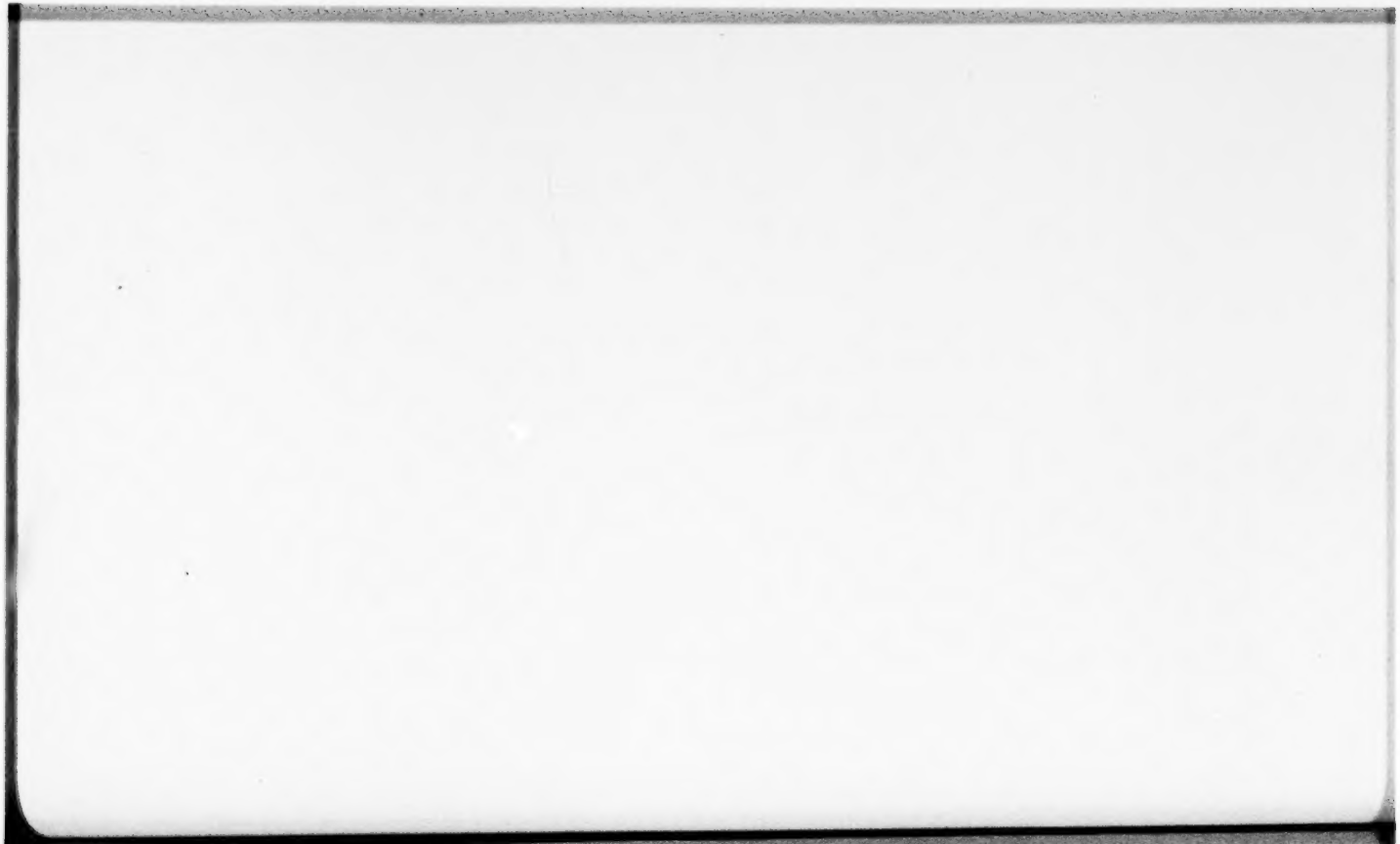
3. The length of the period in the Enlisted Reserve Corps directed on any single day at any specific induction station will be the same and must be either seven (7), fourteen (14), or twenty-one (21) days. There is no objection to certain induction stations within a service command authorizing a seven-day period in the Enlisted Reserve Corps and other stations on the same day authorizing fourteen or twenty-one days.

4. Nothing in this directive is to be construed as revoking the authority of the commanding generals of service commands to extend the period in the Enlisted Reserve Corps in certain individual cases when such extension is necessary to prevent extreme hardship. The recommendations of the State Directors in such cases will be given maximum consideration.

5. The War Department recognizes the desirability of commanding general of service commands authorizing pre-examination of specific individual registrants when so requested by the State Directors of Selective Service when facilities for such examinations are available.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944



FILED
JAN 26 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 723

EMANUEL MAX COHEN AND ALBERT CHARLES SCHNEE,

Petitioners,

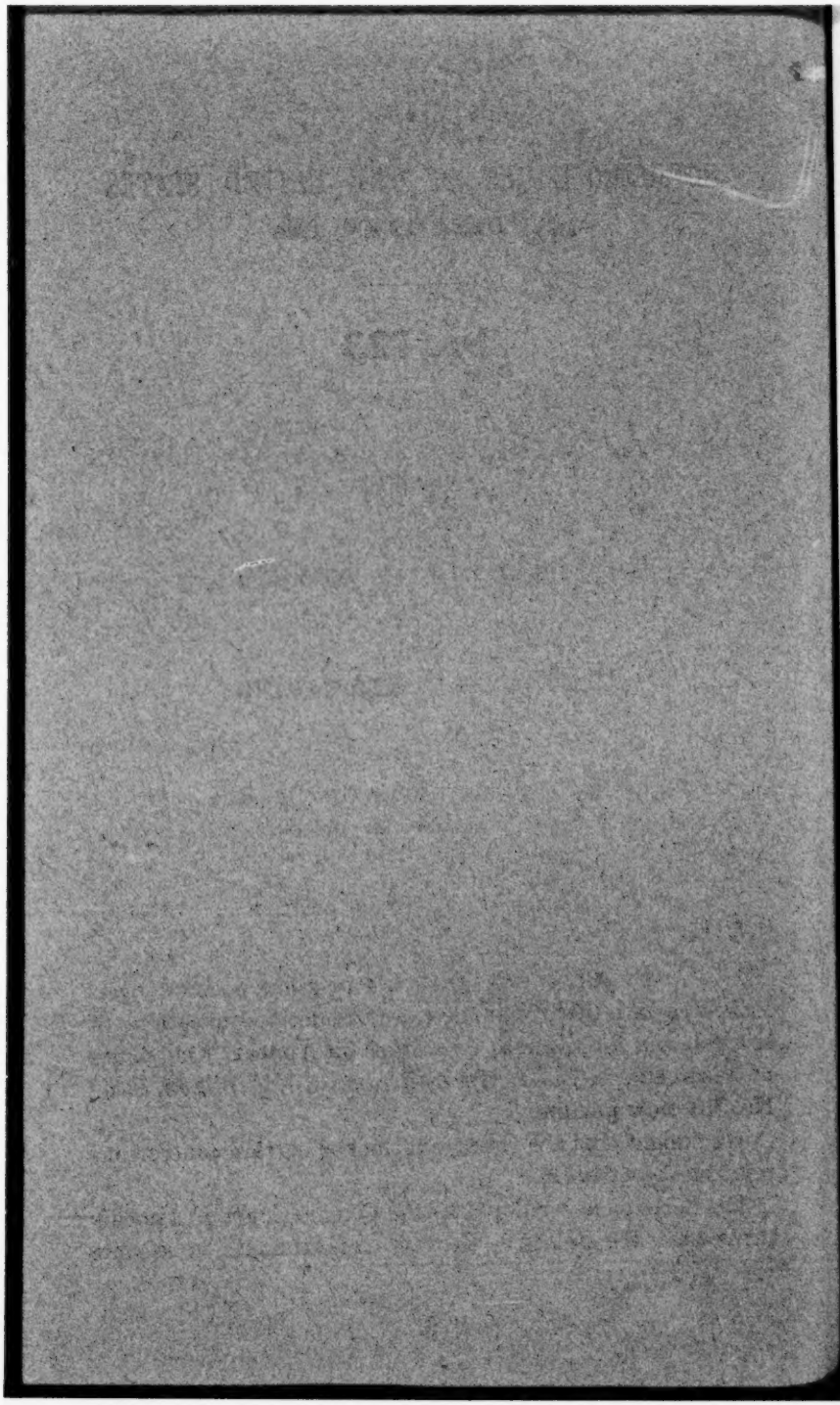
vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

MORRIS LAVINE,
Counsel for Petitioners.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 723

EMANUEL MAX COHEN AND ALBERT CHARLES SCHNEE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING

To the Honorable Harlan F. Stone, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners most respectfully petition for rehearing and respectfully represent as follows:

This court in passing upon the original petition overlooked certain new, important, and undecided questions of law relating to Criminal Procedure on Appeal. One phase of it is similar to that in *Harry Bridges* v. *I. F. Wixon, et al.*, No. 788, now pending.

We submit that the ruling overlooked certain concessions relating to petitioners.

The decision as rendered by the Circuit Court of Appeals turns back the Selective Service and attempts to assume

jurisdiction after turning it over to the military authorities, and is therefore contrary to this court's views in previous military case decisions and the law as established by Congress.

Certain concessions of the government in its brief in opposition should be reconsidered.

I

When the case was submitted to the jury in the District Court, the Regulations and Directives which respondent argued were not submitted to the trial court or jury.

Following the conviction, the Circuit Court of Appeals on May 19, 1944 reversed the conviction, on the ground that petitioner Cohen's official duties as government appeal agent did not include authority to recommend an extension or furlough for a registrant already inducted into the army (Pet. 41-50).

The Government thereafter petitioned for rehearing, inserting into its petition directives and local memorandum of the Selective service.

These memoranda appear for the first time in the government's petition for rehearing. THEY FORM THE BASIS OF THE COURT'S LATER DECISION, AFFIRMING THE JUDGMENT AND FROM WHICH DECISION THIS WRIT IS SOUGHT. They are incorporated in the decision.

The Circuit Court thereupon granted the petition for rehearing (R. 384-385) and on September 29, 1944, affirmed the judgment *without actually holding any hearing*, or giving defense counsel a chance to appear and reargue the case.

It is respectfully submitted that this case involves an important question of appellate court procedure in respect to: (1) Taking new evidence of Memoranda on appeal; (2)

granting rehearings; (3) deciding those cases without oral Argument.

This Court has granted rehearings in cases, but so far as petitioner knows, has always set them down for rehearing before the entire court, for reargument and rebriefing. It has not arbitrarily granted a rehearing upon new evidence presented to it and then arbitrarily reversed the case without hearing the other side.

We do not believe this procedure should be permitted to go unchallenged in appellate practice. A similar practice seems to have taken place in the *Harry Bridges* case No. 788 this term, the petitioner's petition for hearing in this Honorable Court discloses as follows:

> "A petition for a rehearing was filed July 26, 1944. It was principally addressed to the views expressed by the majority concerning their review of the evidence. The petition was denied in an opinion by Judge Stephens dated September 27, 1941 (R. 7811-2). Thereafter, and on November 1, 1944, Judge Stephens without further application by counsel amended the text of his opinion on rehearing."

In the case at bar, a determination by the jury and court required it to consider Local Board Memorandum and practice. None of these presented on rehearing were given to the trial court. Counsel for the defendant had no opportunity to cross-examine the witnesses and find out if there were other memorandum or regulations since that date which might change or alter the authority or legally affect the situation.

Such practice, we submit, has been forbidden by this Honorable Court in the case of *Edwards* v. *U. S.*, 312 U. S. 473, 85 L. Ed. 957. In Edwards versus the U. S. the Supreme Court has said that pursuant to rules VIII and IX of Rules on Appeal, it is fundamental that a case be deter-

mined on evidence given in Court through witnesses. Nothing less is permitted.

However, in the case at bar, no witnesses testified to any memorandum regarding the selective service and none was offered in evidence in the trial. No witness was put on the witness stand and only after the case had been decided on appeal and reversed did the government come in with Memorandum of local draft boards and other data regarding procedure which had made their way before the Circuit Court of Appeals and this Honorable Court. The government made point of this data and so did the Circuit Court of Appeals in reaching its decision. We respectfully submit that this is erroneous procedure. It might be that if a witness was put on the witness stand no additional regulations, memoranda nor procedure could be brought out. Of this we have no knowledge, but at least the opportunity should have been open to the accused and his counsel.

But the Circuit Court did not merely stop with receiving local board memoranda for the first time on appeal. It did not give counsel for the defense the opportunity to be heard or argue the case. We submit that this is erroneous appellate procedure and that a hearing should be granted so that it may be determined for all the circuits what is the correct procedure under the circumstances.

We are not alone in being affected by such procedural conduct which, without notice and an opportunity to be heard, violates the fundamental principles of due process of law. As said in *McVeigh* v. *U. S.*, 11 Wall. 259, "The order in effect denied the respondent a hearing." And in *Windsor* v. *McVeigh*, 93 U. S. 274, Mr. Justice Field said, page 277, "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of

affording the party an opportunity of being heard upon the claim or charges made." The court then goes on to say that in the case where you have been instructed to appear and be heard and the court says "your appearance shall not be recognized and you shall not be heard" results in a decree which is "in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

If one is thus called upon to defend his rights for the first time in a circuit court of appeals and is given no opportunity to be heard or to present matters contrary to those presented in that court, he is denied the first and most fundamental principle of due process of law guaranteed by our 5th Amendment to the Constitution of the U. S., which applies to all officers of the government whether executive, legislative or judicial against action which is arbitrary or capricious.

It is just as fundamental that the procedure in the circuit court of appeals shall only be decided upon full opportunity to be heard. This is one of the inexorable safeguards of justice.

As said by Mr. Chief Justice Hughes in *Morgan* v. *U. S.*, 304 U. S. 1, 18, 19, "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." It may be pointed out that the memoranda to State Directors of Selective Service are not published in the Federal Register and are not available or open to counsel and can only be brought out by defendants through interrogation of witnesses.

II

In its first decision the circuit court of appeals recognized the fact that Sartor, having been only inducted into the Army, was no longer within the jurisdiction of the Selective Service Board for the purposes of any furlough.

As a matter of fact, we think the record amply demonstrates that petitioner Cohen was in no different position in respect to a request to him for a letter than any friend, employer or relative or private person from whom the army is constantly requesting information as to the needs for a person. The government contended, however, in its brief in opposition that "we submit that in the light of the relationship that exists between the Selective Service System and the armed forces" * * * "that section 117 of the Criminal Code, was violated even if, strictly speaking, the functions performed by the Selective Service System in relation to post-induction furloughs *are beyond its authority*" (Page 10 respondent's brief).

We think this is tantamount to an admission that there was no valid authority for Cohen's conviction.

There is no rule so uniformly adhered to by the courts, both State and Federal, as the one that there can be no crime of bribery unless the law requires and imposes upon a person the duty of acting under the particular situation. *Thomson* v. *U. S.*, 37, App. D. C. 461.

The offense of bribery must be to influence *official conduct*. *Sharp* v. *U. S.*, 139 Fed. 878. *Rembrad* v. *U. S.*, 281 Fed. 122. *U. S.* v. *Rosenthal*, 126 Fed. 766.

Nothing further is more strictly established than before one can be convicted there must be a commission or omission of an act defined by statute. *Viereck* v. *U. S.*, 318 U. S. 236, 241, "and then only if punishment is authorized by Congress"—The distinction is between the court and its judicial power.

The trouble with the respondent is that it would turn the continuous process for the selection of men for national service into reverse gear and make it go backwards. We do not believe that this is permitted, that once the inductee is in the service the Army regulations governing furloughs are controlled exclusively. Of course, a general or colonel is not stopped from making inquiries from any source and the mere fact that he does so does not place the person requested as acting in an official capacity. There is nothing in regulations, promulgated or otherwise, that give further authority.

The respondent in its brief before this court, as in the circuit court of appeals, relied upon local board memoranda (respondent's brief 12), for support to sustain the judgment below. The jury did not have the benefit of this memoranda, and neither did the defendant, at the time of trial, nor on appeal were any rights accorded with respect to examination or cross-examination. The government argued that at least Cohen was acting "de facto" (Respondent's brief 13).

The respondent says, "Even if it were thought that functions relating to Sartor's furlough were beyond the regular authority of the local board and of Cohen, the offense would be made out because it is sufficient if the official acted under color of authority, at least if he was a de jure officer, occupying at the time a lawful office.

We think this is a further concession that Cohen was not acting in an official capacity, which gives the court legal authority and we further think the respondent's argument as to "color of authority" is a mistaken view of his position.

A color of authority exists when a man, believing he has the right to an office or believing that he has a right to perform the duties of an office acts in that capacity when he may not have been actually elected or properly selected.

It does not exist where a man has a lawful office but does something which is not within the scope of his duties as defined by statute and regulations.

III

The government contends that the admission in evidence of Schnee after his arrest did not render inadmissible against him and Cohen the statement which he made to the F. B. I. This view it takes because Schnee, when interviewed, did not regard the conspiracy as being at an end (Respondent's brief 17).

The test, however, is not what Schnee thought or what the F. B. I. thought but what actually occurred. And it has been uniformly held that the arrest of a person on the charge of conspiracy terminates the conspiracy and statements made thereafter may not be used in brief and in furtherance of conspiracy. To this argument, the respondent says that no one had told Schnee he was under arrest, which results in a question as to what constitutes an arrest. We think that the circumstances revealed by the record show that Schnee was taken into Custody and that his own attorney was not permitted to contact him (Respondent's brief 271, 273). If a man is so detained that his own lawyer can't get in touch with him he certainly is under arrest. The use of the statements thereafter obtained was, we submit, prejudicial error.

For each of the above reasons the petitioner prays that this Honorable Court grant a re-hearing and reverse the judgment below.

Respectfully submitted,

MORRIS LAVINE.

(6268)